Supreme Court, U.S.
FILED

05-766 DEC 12 2005

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No. 05-

In the Supreme Court of the United States

APCC SERVICES, INC., ET AL.,

Petitioners,

v.

SPRINT COMMUNICATIONS COMPANY L.P., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the express right of action to sue for damages arising from common carriers' violations of the Communications Act (47 U.S.C. §§ 206-207) permits suits against common carriers that fail to pay compensation to payphone service providers in accordance with FCC orders, when the FCC has determined that a carrier's failure to pay violates (1) Section 201(b), which prohibits unjust or unreasonable practices by common carriers; (2) Section 416(c), which establishes a "duty of every person * * * to observe and comply with" "[e]very order of the Commission" and (3) Section 276, in which Congress directed that payphone service providers must be "compensated for each and every completed intrastate and interstate call."

PARTIES TO THE PROCEEDING

The petitioners, plaintiffs-appellees below, are APCC Services, Inc.; Data Net Systems, L.L.C.; Davel Communications Group, Inc.; Jaroth, Inc. d/b/a Pacific Telemanagement Service; NSC Telemanagement Corp., n/k/a Intera Communications Corporation; and Peoples Telephone Co., Inc.

The respondents, defendants-appellants below, are Sprint Communications Co., L.P., and AT&T Corporation.

RULE 29.6 STATEMENT

APCC Services, Inc., a Virginia corporation, is a for-profit subsidiary of the American Public Communications Council, Inc., a District of Columbia not-for-profit corporation that is not publicly traded.

Data Net Systems, L.L.C., is an Illinois Limited Liability Company that is not affiliated with any publicly traded company.

Davel Communications Group, Inc. is an Illinois corporation whose parent corporation, Davel Communications, Inc., is a publicly traded corporation that holds a 10 percent or greater ownership in Davel Communications Group, Inc.

Jaroth, Inc. d/b/a Pacific Telemanagement Services is a California corporation that is not affiliated with any publicly traded company.

NSC Telemanagement Corporation n/k/a Intera Communications Corporation is a California corporation that is not affiliated with any publicly traded company.

Peoples Telephone Company, Inc. is a Florida corporation whose parent corporation, Davel Communications, Inc., is a publicly traded corporation that holds a 10 percent or greater ownership in Peoples Telephone Company, Inc.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (App., *infra*, 1a-30a) are reported at 418 F.3d 1238. The district court's order denying Sprint's motion to dismiss and granting in part petitioners' motion to amend their complaint (App., *infra*, 79a-80a) is unreported, but the court's reasons are explained in a concurrent decision in a related case, *APCC Services, Inc.* v. *Cable & Wireless, Inc.* (App., *infra*, 81a-93a), which is reported at 281 F. Supp. 2d 52. The district court's orders denying motions for reconsideration and granting certification of an interlocutory appeal (App., *infra*, 31a-45a and 46a-60a) are reported at 297 F. Supp. 2d 90 and 297 F. Supp. 2d 101. Opinions of the district court addressing issues other than the ones raised in this petition (App., *infra*, 61a-78a, 94a-108a, and 109a-145a) are reported at 281 F. Supp. 2d 41, 254 F. Supp. 2d 135, and 305 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2005. The orders of the court of appeals denying rehearing and rehearing *en banc* (App., *infra*, 148a-151a) were entered on November 10, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth at App., *infra*, 152a-179a.

STATEMENT

These consolidated cases concern the manner by which Congress creates an *express* private right of action, and the deference owed to the Federal Communications Commission (FCC) when it exercises its delegated authority to specify practices that violate the Communications Act. A common carrier

that violates the Act is liable for damages sustained in consequence of the violation. 47 U.S.C. § 206. Injured persons may recover damages, either through proceedings at the FCC or by suing in district court, pursuant to a right of action expressly provided in the Act. 47 U.S.C. § 207. The FCC determined that interexchange carriers (IXCs or, colloquially, long-distance carriers) violate three separate provisions of the Act if they fail to pay compensation to payphone service providers (PSPs) in accordance with FCC orders that require such payment. If the FCC's determinations are given the deference they deserve, PSPs have a right to sue in district court under Section 207[1] to recover unpaid compensation. A divided panel of the D.C. Circuit held that PSPs have no right of action to bring such cases.

The panel held that petitioners have no right of action under Section 207 to assert claims that respondents' refusal to pay compensation in accordance with the FCC's rules is an "unjust or unreasonable" practice that violates Section 201(b). In doing so, it disregarded – it did not even acknowledge the existence of – the FCC's determination in a notice-and-comment rulemaking that such a refusal would violate Section 201(b); the Commission's reaffirmation of that conclusion in an *amicus curiae* brief in this litigation; respondents' own assertion to the court of appeals (in earlier litigation involving APA review of the FCC's rules) that PSPs could recover damages under Section 207 if IXCs failed to pay the required compensation; or the court's endorsement of and reliance on that assertion when it upheld the FCC's rules. Instead, the panel asserted that "the Commission did not attempt" to construe Section 201(b) to encompass a violation of its payphone compensation rules. App., *infra*, 17a.

The Ninth Circuit reached the opposite conclusion when it considered precisely the same question. *Metrophones Telecom-*

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[1] Unless otherwise indicated, all references to "sections" in this petition refer to sections codified in 47 U.S.C.

munications, Inc. v. *Global Crossing Telecommunications, Inc.*, 423 F.3d 1056 (2005), petition for cert. pending, No. 05-705. It held that Congress delegated authority to the FCC to define unjust or unreasonable practices, that the FCC had authoritatively construed the statute, and that its construction was reasonable because "allowing for private actions to recover payphone compensation is an integral part of the regulatory system that Congress ordered the Commission to design." *Id.* at 1070. The Ninth Circuit properly granted deference to the FCC's interpretation of the statute, under the principles established in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), and *Nat'l Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 125 S. Ct. 2688 (2005). Notably, the emphatic reaffirmation in *Brand X* of the deference owed to the FCC occurred one day before the D.C. Circuit panel issued its ruling, and the Ninth Circuit relied heavily on *Brand X* in *Metrophones*, but the D.C. Circuit's opinion makes no mention of *Brand X*, and the panel did not amend its opinion on hearing after *Brand X* and *Metrophones* were called to its attention.

This conflict with the Ninth Circuit's *Metrophones* decision is only one of several circuit conflicts presented by this case.[2] The D.C. Circuit held that there is no right to sue for a violation of Section 201(b) if the FCC has not yet determined whether the alleged practice is unjust or unreasonable – in other words, that PSPs cannot even initiate a lawsuit because the merits of their

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[2] Global Crossing Telecommunications, Inc., the appellant in *Metrophones*, has also filed a petition for a writ of certiorari, No. 05-705 (docketed Dec. 2, 2005). That petition, like this one, seeks certiorari because of the circuit conflict on whether a violation of Section 201(b) gives rise to a right of action. This petition also seeks review of related arguments not raised in the *Metrophones* petition: a circuit conflict concerning the interpretation of Section 416, and the D.C. Circuit's misinterpretation of *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), in holding that a right of action cannot be based on violations of Section 276.

claims have not yet been decided. A long line of decisions by this Court and by other courts of appeals reject that proposition.

The court of appeals also held that petitioners have no right of action to allege that respondents violated Section 416(c). That decision rests on the conclusion – again contrary to the FCC's construction of the statute – that Section 416, which requires compliance with "[e]very order of the Commission," does not require compliance with the payphone compensation order because it is a rulemaking order, rather than an adjudicatory order. As the D.C. Circuit acknowledged, six other circuits have rejected that proposition.

Finally, the court held that Section 207 does not provide a right of action to allege violations of Section 276. That statutory provision unambiguously expresses Congress's judgment that PSPs must be compensated for "each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1). But the court decided that a carrier's failure to pay the compensation required by law does not violate Section 276.

The D.C. Circuit's disregard for the views of the agency charged with administering a complex regulatory scheme will exacerbate confusion and inconsistency in the lower courts, will undermine national uniformity in implementing an important congressional policy, and will inflict a serious injustice on petitioners by denying them the compensation Congress required.

A. The Regulatory Framework Created By Congress

Before 1990, PSPs frequently sent all long-distance calls from their payphones to a single IXC, pursuant to exclusive contractual arrangements under which the IXC would bill the caller (or the called party) and remit compensation to the PSP for the use of its payphone.[3] Congress ended such exclusive

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[3] This arrangement is more convenient for callers and entails much lower

arrangements in 1990. It enacted legislation – the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), codified at 47 U.S.C. § 226 – that required PSPs to permit callers to use the services of *any* IXC, not just the IXC who had contracted with the PSP. See 47 U.S.C. § 226(c)(1)(B).

"Dial-around" calls (so named because a caller can "dial around" the IXC that has a contractual arrangement with the PSP, *e.g.*, by placing an "800" call to reach another IXC's network) enabled companies like AT&T and Sprint to generate millions of dollars in revenue by providing calling-card and toll-free calling services that could be used from any payphone, but left PSPs largely uncompensated. See *APCC* v. *FCC*, 215 F.3d 51, 53 (D.C. Cir. 2000) (describing industry history). Dial-around calls constituted about one-third of payphone usage when these cases were filed (*APCC* v. *AT&T* Compl. ¶ 15), and the absence of compensation for such calls severely reduced PSPs' incentives to deploy and maintain payphones, threatening the public's access to a critical service.

Congress had some sense of this risk when it enacted TOCSIA, and directed the FCC to "consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones" for dial-around calls. 47 U.S.C. § 226(e)(2). The FCC did so in a series of rulemakings. See *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 F.C.C.R. 4736 (1991) (First Report and Order); *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Second Report and Order, 7 F.C.C.R. 3251

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transaction costs than direct payment from the caller to the PSP. See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C.R. 20,541, 20,580 ¶ 77 (1996) (First Order).

(1992) (Second Report and Order). In those rulemakings, the FCC stated that it was acting pursuant to its authority under Section 201, which requires that "charges, practices, classifications, and regulations for and in connection with" a common carrier's services must be "just and reasonable." See, e.g., First Report and Order ¶ 59; Second Report and Order ¶ 66.

It quickly became apparent that the TOCSIA regime would not ensure adequate compensation for PSPs. In 1996, Congress took forceful measures to address the problem. To "promote the widespread deployment of payphone services to the public," Congress directed the FCC to "take all actions necessary * * * to prescribe regulations that establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphones." 47 U.S.C. § 276(b)(1). The FCC developed such a plan and has modified it from time to time through a series of notice-and-comment rulemakings. See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 F.C.C.R. 19,975, 19,977-19,983 ¶¶ 5-17 (2003) (2003 Order) (describing regulatory history). The FCC's compensation plans generally have required an IXC to pay compensation when it is the primary economic beneficiary of a call. See, *e.g.*, First Order, 11 F.C.C.R. at 21,277 ¶ 83.

In rulemakings under the 1996 Act, as in rulemakings under TOCSIA, the FCC identified Section 201 as one of the sources of its statutory authority to prescribe regulations. See, *e.g.*, First Order, 11 F.C.C.R. at 20,720 ¶ 364; *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 F.C.C.R. 1778, 1845 ¶ 166 (1997); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, 14 F.C.C.R. 2545, 2648 ¶ 232 (1999) (1999 Order). In the first

rulemaking, the FCC requested comment on its tentative conclusion that it should exercise its jurisdiction under Section 201(b) "to ensure that PSPs are compensated for international as well as interstate and intrastate calls." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 F.C.C.R. 6716, 6726 ¶ 18 (1996). After considering comments on that question, the FCC concluded that Section 201(b) provided statutory "authority * * * to ensure that PSPs are fairly compensated for international as well as interstate and intrastate calls." First Order, 11 F.C.C.R. at 20,569 ¶ 54.[4] Sprint and AT&T both participated in this rulemaking and sought review of other aspects of the First Order, but did not seek review of the FCC's assertion of Section 201(b) jurisdiction. Indeed, AT&T's comments endorsed the FCC's tentative conclusion. AT&T Comments, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996* at 5 (July 1, 1996).

In its 1999 Order, the FCC decided that its per-call compensation rate would not include allowances to cover the bad-debt expenses that PSPs incurred when IXCs refused to pay the amounts they owed. 1999 Order, 14 F.C.C.R. at 2618-2620 ¶¶ 160-162. PSPs challenged that decision in the D.C. Circuit. AT&T and Sprint intervened to defend the FCC's decision; they argued that the decision was reasonable because a carrier's "failure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages as well as fines and penalties. See 47 U.S.C. §§ 206-208, 501-03." Final Joint Brief of Long Distance, Paging, and Consumer Intervenors in Support of Respondents, *APCC* v. *FCC*, No. 99-1114 (filed Sept. 7, 1999). That assertion *necessarily* means that a failure

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[4] The FCC also invoked its authority under Section 4(i), 47 U.S.C. § 154(i), which authorizes the promulgation of rules that are "necessary in the execution of [the Commission's] functions."

to pay compensation violates *the Act* (in addition to violating the FCC's rules) and that damage actions can be brought *in federal court* (and not merely in FCC proceedings) because Section 206 establishes liability only for violations of "this Act" and Section 207 states that injured parties "may either make complaint to the Commission * * * or may bring suit * * * in any district court." The court of appeals agreed that unpaid compensation could be recovered under Sections 206-208 – directly quoting AT&T's and Sprint's brief to emphasize the point – and relied on that fact in holding that the FCC's exclusion of bad-debt costs was reasonable. *APCC* v. *FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000).[5]

In its 2003 rulemaking, the FCC asked "whether PSPs have access to adequate avenues of relief in instances where our PSP compensation rules are violated." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 18 F.C.C.R. 11,003, 11,012 ¶ 19 (2003). The answer to that question had a direct bearing on which party should be required to compensate PSPs for calls ultimately terminated by "switch-based resellers." To address the bad-debt issue, the FCC sought to determine the available remedies for nonpayment of required compensation. PSPs argued that IXCs should be required to pay for such calls (with a right to recover from switch-based resellers the amounts paid) because PSPs had difficulty collecting from the switch-based resellers. AT&T, in

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[5] In this litigation, AT&T and Sprint have argued exactly the opposite. They have asserted that a failure to comply with the FCC's payphone compensation *regulations* is not and cannot be a violation of *the Act*, and that Sections 206-208 authorize actions only based on violations of *the Act*. While conceding that compliance with the payphone compensation rules may be enforced through penalties payable to the government under Sections 502 and 503, they have not conceded that PSPs can pursue an action for damages either at the FCC or in federal court. See Oral Arg. Tr., *APCC Services, Inc.* v. *Sprint Communications Co. L.P.*, D.C. Cir. No. 04-7034, at 12-13 (Oct. 21, 2004).

response, pointed to PSPs' right to recover damages under Sections 206-208 and argued that PSPs "should use those remedies rather than simply shift the collection problem to someone else." Comments of AT&T Corp. at 19 (June 23, 2003). The FCC again supported the position of the IXCs. Echoing AT&T's comments, the FCC opted to leave PSPs responsible for pursuing collection of the unpaid compensation, emphasizing the court of appeals' previous statement that Sections 206-208 provided a remedy to recover unpaid compensation. The FCC then stated, unequivocally, "A failure to pay in accordance with the Commission's payphone rules * * * constitutes both a violation of section 276 and an unjust or unreasonable practice in violation of section 201(b) of the Act." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 F.C.C.R. 19975, 19990 ¶ 32 (2003) (2003 Order).

Despite the FCC rules, AT&T, Sprint, and other IXCs have failed to pay the required compensation for millions of calls. PSPs turned to petitioners to seek recovery of this unpaid compensation. Petitioners are "aggregators" who operate as intermediaries between PSPs and IXCs. They collect billing information from PSP clients, provide that information to IXCs or their agents, collect the IXCs' payments, and distribute those payments to their PSP clients. Petitioners provide those billing and collection services to approximately 1400 PSPs that own and operate more than 400,000 payphones, each of which may be entitled to compensation from hundreds of IXCs. Each PSP whose compensation is at issue in this litigation initially granted a power of attorney to its aggregator to deal with IXCs for billing and collection matters and later assigned its claims to the aggregator for litigation and collection.[6]

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[6] Petitioners Jaroth, Inc., NSC Telemanagement, and Peoples Telephone Co. also seek to recover unpaid compensation as owners of PSPs. Thus, they assert direct claims, in addition to claims they assert as assignees.

B. The District Court Proceedings

Petitioners filed separate suits against Sprint and AT&T in the district court for the District of Columbia, invoking the right of action provided in Section 207 and alleging that defendants had violated Section 276. Both cases were assigned to the same district court judge, as were other cases asserting similar claims against different defendants.[7]

Four years into the litigation, AT&T moved to dismiss the complaint, asserting that petitioners lacked standing because they had pledged to account to the assignor-PSPs for the litigation proceeds. The district court initially granted this motion (App., *infra*, 108a) but reversed its decision on reconsideration. App., *infra*, 78a. AT&T, in turn, requested reconsideration of that decision, which the district court denied. App., *infra*, 59a.

While standing issues were being litigated in the AT&T case, questions concerning PSPs' rights to sue for damages were raised in litigation in other jurisdictions. District courts struggled with the question whether a violation of the payphone compensation rules constitutes a violation of Section 276 that gives rise to a cause of action under Section 207. A district court in the Northern District of California held that there is a right of action. *Precision Pay Phones* v. *Qwest Communications Corp.*, 210 F. Supp. 2d 1106 (N.D. Cal. 2002). District courts in the Eastern District of Texas, the Southern District of California, and the Central District of California held that there is no right of action. *Phonetel Tech., Inc.* v. *Network Enhanced Telecomm.*, 197 F. Supp. 2d 720 (E.D. Tex. 2002); *W. Communications Syst.* v. *Global Crossing Telecomm., Inc.*, No. 01-CV-1468 (S.D. Cal. Sept. 20, 2001); *Greene* v. *Sprint Communications*, No. 02-CV-3841 (C.D. Cal. July 2, 2002).

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[7] Cases against WorldCom and Cable & Wireless were stayed when those defendants sought bankruptcy protection.

After the district court's decision in *Greene*, petitioners moved to amend their complaint against Sprint (and their complaint against Cable & Wireless in a case before the same judge) by adding claims under Sections 201(b) and 416(c). The court granted leave to amend, holding that there is a right of action under Section 207 to allege violations of Sections 201(b), 276, and 416(c). App., *infra*, 81a-93a; see also *id.* at 32a & n.3, 79a-80a. Contemporaneously, the Ninth Circuit affirmed dismissal in the *Greene* case, finding no right of action arising from a violation of Section 276. *Greene* v. *Sprint Communications Co.*, 340 F.3d 1047 (2003), cert. denied, 541 U.S. 988 (2004). In light of the Ninth Circuit's decision, Sprint sought reconsideration of the district court's decision to permit amendment of petitioners' complaint in this litigation and also moved to dismiss the amended complaint.[8] The district court denied Sprint's motions and, noting the conflicting decisions in other courts, certified both the private-right-of-action questions and the standing question for interlocutory appeal. App., *infra*, 31a-45a. The court of appeals accepted the interlocutory appeals and consolidated the Sprint and AT&T cases. App., *infra*, 146a-147a.

C. The Court of Appeals' Decision

The court of appeals held (over Judge Sentelle's dissent) that the petitioner-assignees have standing, but a different ma-

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[8] AT&T did not move to dismiss or otherwise challenge in the district court the proposition that plaintiffs may sue for damages in federal court under the Communications Act. See App., *infra*, 47a n.3. However, AT&T fully participated in the appeal of that issue when its case was consolidated with Sprint's case in the D.C. Circuit, and the disposition of that issue will control the case against AT&T on remand to the district court. Because AT&T never moved to dismiss the case for lack of a private right of action, plaintiffs never took the formality of amending their complaint to add citations to all the statutory sections they invoked against Sprint. Should this Court grant certiorari and hold that there is a right of action under any section of the Communications Act, the district court presumably would allow an amendment of the complaint against AT&T, if necessary.

jority held that petitioners have no right of action to pursue the claims.

Over Chief Judge Ginsburg's dissent, two judges held that the alleged violation of Section 201(b) did not give rise to a cause of action under Section 207. The majority asserted that the question "is not so much whether there is a private right of action, but where – directly in district court, or in the Commission"[9] – and apparently believed that the conduct alleged in this case could violate Section 201(b) only if "*any* * * * violation of a Commission order" would be an unjust or unreasonable practice. App., *infra*, 15a (emphasis added). The majority observed that the FCC cited Section 201(b) as a source of its authority to issue the 1999 Order but found it significant that, in the body of that order, the FCC did not discuss whether the rules would be privately enforceable in court. App., *infra*, 16a. "A court should be reluctant to put words in the Commission's mouth – here, the words 'unjust and unreasonable.' The Commission never, in its 1999 Order, specified that a carrier's failure to pay was of this magnitude. Given the potential consequences to judicial dockets of the Commission's making that finding, we should require a clear statement (and analysis) by the agency." App., *infra*, 16a. The majority did not question the FCC's "power to interpret § 201(b) to encompass violations of its rules * * *. We do say the Commission did not attempt to exercise any such power here." App., *infra*, 17a.

That conclusion entirely ignored the FCC's 2003 Order, which stated clearly that a failure to pay in accordance with the

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[9] Although the court made clear that PSPs could file claims for damages in FCC proceedings, it did not explain what effect, if any, the dismissal of cases filed in district court might have on the application of the statute of limitations (in FCC proceedings) to claims asserted in this litigation that would lie outside the statute of limitations (if it is not tolled) if petitioners take their complaint to the FCC. See 47 U.S.C. § 415(b) (two-year statute of limitations for complaints seeking recovery of damages).

payphone rules violates Section 201(b). Even respondents concede that the FCC "has spoken" on that issue.[10] They have never suggested that the FCC's interpretation of the statute is unclear; instead, they have argued that the interpretation was impermissibly inconsistent with other provisions of the Act.[11]

The majority also ignored the *amicus* brief that the FCC had submitted – even though counsel for the FCC had participated in oral argument, and had made a post-argument written submission in further support of the FCC's construction of Section 201(b). The FCC's brief explained that the FCC had determined that a failure to pay compensation in accordance with the payphone rules is an unjust or unreasonable practice that violates Section 201(b), and also violates Sections 276 and 416(c) of the Act. The FCC explained that the statute confers on PSPs a right to be fairly compensated for each and every completed call; that the FCC exercised its delegated authority to apply and interpret the statutory requirements by adopting the payphone rules and by declaring a violation of those rules to be unjust or unreasonable; and that – as the FCC was contemporaneously arguing to this Court in *Brand X* – its authoritative interpretation of the statute is entitled to deference under *Chevron*.

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[10] At argument, Judge Ginsburg quoted from paragraph 32 of the FCC's 2003 Order, then asked respondents: "So the Commission has spoken to that, right? Mr. Murray: Yes. Judge Ginsburg: They have said this is an unjust, would be an unjust and unreasonable practice. Mr. Murray: Yes, Your honor." Oral Arg. Tr., *APCC Services, Inc.* v. *Sprint Communications Co. L.P.*, D.C. Cir. No. 04-7034, at 8 (Oct. 21, 2004).

[11] The majority did not accept respondents' legal arguments that Section 201(b) could not be construed to encompass violations of the payphone rules. See App., *infra*, 17a ("We do not say that the Commission has no power to interpret § 201(b) to * * * create private rights of action in courts * * *."). Judge Ginsburg emphatically rejected the arguments. App., *infra*, 28a (respondents "do not even purport to ground that limitation in the text [of the statute]. Nor is there any precedent supporting such a limitation."). So did the Ninth Circuit. *Metrophones*, 423 F.3d at 1067-1069.

The FCC also explained that respondents' arguments would undermine the congressional policy of ensuring fair compensation to PSPs. The logic of respondents' statutory interpretation, the FCC explained, would preclude recovery of damages in any forum because the statutory provision that authorizes damage actions in federal court – Section 207 – is the same provision that authorizes such actions at the FCC. The Commission never contemplated that *all* claims for damages would be brought before the agency, and cutting off the right to pursue such claims in court would impose unexpected burdens on FCC resources. Moreover, the FCC's brief explained that judicial resolution of such cases would raise no genuine concern about the consistent interpretation of FCC policy, because the cases involve largely factual questions. Brief For Federal Communications Commission As Amicus Curiae In Support Of Appellees, *APCC Services* v. *Sprint Communications Co. L.P.*, D.C. Cir. No. 04-7034 (Aug. 23, 2004) (FCC Br.). Yet the majority opinion did not acknowledge the FCC's brief.

Chief Judge Ginsburg dissented. He explained that the FCC had offered its authoritative interpretation of Section 201(b), and that the majority could say otherwise "only because it makes no mention of the 2003 Report and Order and fails to note that the Commission filed an amicus brief in this case advancing the same position." App., *infra*, 27a. He opined that the FCC's interpretation was consistent with the statute and was entitled to deference under *Chevron*. "One would * * * be hard-pressed to say the Commission acted unreasonably when it deemed a common carrier's failure to pay just and reasonable compensation an unjust and unreasonable practice." App., *infra*, 30a. He disputed the majority's premise that the FCC's determination would mean that every violation of an FCC regulation is an unjust or unreasonable practice; the question is whether a violation of *this* regulation is unjust or unreasonable. Chief Judge Ginsburg also took issue with the majority's contention that the FCC did not adequately justify a statutory

interpretation that permits private suits in court. "It is not for the Commission to decide whether the plaintiffs may sue in federal court for a violation of the statute; the Congress has already made that determination." App., *infra*, 27a.

The court also held, unanimously, that there is no right of action to allege violations of Sections 416(c) or 276. There could be no violation of Section 416(c), the court held, because that section's reference to "[e]very order of the Commission" should be read to mean only adjudicatory orders, not rulemaking orders. The court recognized that six circuits have rejected that reading, but adopted the reasoning in *New England Telephone & Telegraph Co.* v. *Public Utilities Commission*, 742 F.2d 1 (1st Cir. 1984), which construed the term "order" in Section 401 to mean only adjudicatory orders. App., *infra*, 17a-20a.

Section 276 cannot support a right of action, the court held, because it lacks "rights-creating language" and does not require the FCC to designate IXCs as the party responsible for PSP compensation. A violation of FCC regulations issued pursuant to the statute is insufficient to support a right of action under Section 207 because Section 207 requires a violation of the Act, not merely a violation of FCC rules. App., *infra*, 11a-14a.

Petitioners sought rehearing and rehearing *en banc*, relying on (among other things) this Court's *Brand X* decision, which deferred to the FCC's interpretation of the Communications Act one day before the D.C. Circuit in this case refused to defer to the FCC's interpretation of the same Act. While the rehearing petition was pending, the Ninth Circuit (applying *Brand X*) unanimously held in *Metrophones* that PSPs could sue for violations of Section 201(b). The Ninth Circuit noted that its holding was in conflict with the D.C. Circuit's recent decision in this case, but expressly adopted the reasoning of Chief Judge Ginsburg's dissent and held that the FCC had reasonably determined that a failure to pay compensation is an unjust or unreasonable practice. 423 F.3d at 1066 n.5. Petitioners informed

the D.C. Circuit that its decision conflicted with *Metrophones*, but the court denied the petitions for rehearing (on a 2-1 vote) and rehearing *en banc* (on a 5-3 vote). App., *infra*, 148a-151a.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's Holding That There Is No Right Of Action Arising From A Violation Of Section 201(b) Conflicts With Decisions By This Court And Other Courts Of Appeals

Section 201(b) provides in pertinent part that "any * * * charge [or] practice * * * that is unjust or unreasonable is hereby declared to be unlawful." The Act's *express* private right of action allows damages in court whenever a common carrier "shall do * * * any act, matter, or thing in this chapter * * * declared to be unlawful." 47 U.S.C. § 206. Because in Section 201(b) all unjust or unreasonable practices are "declared to be unlawful" – the very language of Section 206 – it has never been disputed in this litigation that *every* unjust or unreasonable practice gives rise to an *express* private right of action.

What *is* in dispute is whether failure to comply with the FCC's dial-around compensation rules is an unjust or unreasonable practice. Oddly, however, the D.C. Circuit's opinion never actually answers that question. Instead of holding that such a failure is "just" and "reasonable" – as it would have to be for there *not* to be private right of action under Congress's express words – the D.C. Circuit's opinion focuses on the different question whether the FCC *has declared* the practice to be unjust or unreasonable. The answer to *that* question is indisputably yes, but the D.C. Circuit somehow answered it no. The D.C. Circuit therefore failed to defer to what the FCC *has* said.

Even if the relevant question were what the FCC has declared, rather than what is "just or reasonable," and *even if* the FCC had been as silent as the D.C. Circuit claimed, it would not follow that these lawsuits should be dismissed. What would

follow is that an appropriate mechanism – such as a primary jurisdiction referral – should be used to ascertain the FCC's views. A primary jurisdiction referral to ascertain views the FCC has already expressed clearly would make little sense in this case. That fact – and the existence of the doctrine for dealing with the situation the D.C. Circuit *claimed* it was confronting, without dismissing lawsuits as a result – simply highlights how untenable is the D.C. Circuit's insistence on dismissal of this case.

A. The Decision Conflicts With The Ninth Circuit's Holding In *Metrophones* That There Is A Right Of Action To Sue For Violations Of Section 201(b) And With This Court's Deference Decisions

The D.C. Circuit's ruling squarely conflicts with the Ninth Circuit's decision in *Metrophones*. Both cases presented precisely the same question: Can a PSP sue for damages in federal court pursuant to the express right of action in Section 207, alleging that an IXC has violated Section 201(b) by failing to pay compensation in accordance with the FCC's rules? The Ninth Circuit held that there is a right of action to bring such suits; the D.C. Circuit held the opposite.

The two courts offered divergent answers to this question because they disagreed on a recurring question of broad importance: When does *Chevron* require deference to an agency's statutory interpretation?

The Ninth Circuit properly recognized that *Chevron* and *Brand X* govern this case. *Metrophones*, 423 F.3d at 1065-1070. It asked whether the FCC's 2003 Order, supplemented by its *amicus* brief, reflected an authoritative construction of an ambiguous statutory provision, *i.e.*, whether the agency was exercising authority delegated by Congress to fill in the gaps of the statutory scheme. See *Chevron*, 467 U.S. at 843-844; *Mead*, 533 U.S. at 226-227. The Ninth Circuit rejected the argument that the FCC's construction should be disregarded because it

came after *Greene*, which held that there is no right of action under Section 276. It correctly recognized that *Brand X* requires deference to the agency's interpretation, even if *Greene* could be interpreted as an implicit interpretation of Section 201(b). *Metrophones*, 423 F.3d at 1065.

The D.C. Circuit, however, did not believe that any of this Court's deference decisions even required *consideration* of the FCC's 2003 Order or its *amicus* brief. Perhaps the majority believed the FCC's interpretation was foreclosed by *Greene*, an argument that the court that decided *Greene* later rejected in *Metrophones* on the authority of *Brand X*. Perhaps it believed that an agency's brief is never entitled to deference or that the FCC's explanation was too cryptic. But cf. *Nat'l Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 419-420 (1992) (extending *Chevron* deference to interpretation offered in agency's brief when interpretation was "a necessary presupposition" of the agency's decision); *Metrophones*, 423 F.3d at 1065-1067 (extending *Chevron* deference despite brevity of FCC's interpretation). Whatever the reason for the majority's unexplained refusal to consider the agency's interpretation, that refusal reflects a fundamental divergence with the Ninth Circuit on an issue of great importance in administrative law.

The D.C. and Ninth Circuits also applied entirely different standards when they evaluated the substance of the FCC's interpretation. The Ninth Circuit asked whether the FCC reasonably interpreted Congress's policy to ensure compensation to PSPs and whether its interpretation would promote that congressional objective. 423 F.3d at 1070. The D.C. Circuit never asked if the FCC's interpretation would promote the objectives of the Act; instead, it demanded that the FCC justify its interpretation in light of the "potential consequences to judicial dockets" and faulted the FCC for failing to justify *Congress's* judgment, expressed in Section 207, that damages could be recovered in court as well as through FCC proceedings. App., *infra*, 16a.

These irreconcilable views of the proper relationship between agency and court can only lead to further confusion among the lower courts when they apply *Chevron* and its progeny, including the *Brand X* decision on which the Ninth Circuit heavily relied. The potential for inconsistency is especially troublesome because the agency here was construing a statute that requires "just and reasonable" rates and practices. The "just and reasonable" standard is ubiquitous in federal regulatory schemes, and until now has always been thought to call for the highest order of deference to the agency assigned to flesh it out. See *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 501-502 (2002). The circuit conflict will undermine consistency and transparency in review of agencies' interpretations of that standard – interpretations that control a wide array of business practices in regulated industries.

Furthermore, the D.C. Circuit's decision is simply wrong. "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 125 S. Ct. at 2699. Citing Section 201(b), the very provision of the Communications Act at issue here, this Court held in *Brand X* that "[t]he *Chevron* framework governs our review of the Commission's construction." *Ibid.* The D.C. Circuit gave no reason – it did not even *try* to give a reason – for its failure to apply the *Chevron* framework to the FCC's construction of Section 201(b).

B. The D.C. Circuit's Decision Conflicts With A Large Body Of Law Applying The Primary Jurisdiction Doctrine

Even if the FCC had not yet decided whether a failure to pay compensation is an unjust or unreasonable practice, the D.C. Circuit's judgment would be wrong. That judgment suggests that a practice cannot be unjust or unreasonable unless the

FCC has *previously* found it to be unjust or unreasonable – in other words, that there is no right of action to assert a claim that conduct is unlawful unless the agency has already determined it to be unlawful. That proposition conflicts with *Reiter* v. *Cooper*, 507 U.S. 258, 268 (1993), and other cases applying the primary jurisdiction doctrine.[12]

Federal courts have entertained countless cases alleging violations of Section 201(b) and closely related provisions. See, *e.g.*, *In re Long Distance Telecommunications Litigation*, 831 F.2d 627 (6th Cir. 1987); *Pac. Tel. & Tel. Co.* v. *MCI Telecommunications Corp.*, 649 F.2d 1315 (9th Cir. 1981); *Nat'l Comm's Ass'n, Inc.* v. *AT&T*, 46 F.3d 220 (2d Cir. 1995); *Allnet Communication Service, Inc.* v. *Nat'l Exchange Carrier Ass'n, Inc.*, 965 F.2d 1118 (D.C. Cir. 1992) (Section 203). These cases are cognizable in court under the right of action expressly provided in Section 207, but in many such cases it is unclear at the outset whether the FCC would regard the alleged practice as a violation of the Act. As this Court and others have recognized, such uncertainty about the merits of a claim does not require dismissal; rather, uncertainty about whether a practice qualifies as unjust or unreasonable calls for a primary jurisdiction referral so the agency can address the unresolved question before the court renders judgment on the claim that is properly before it.

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[12] We did not suggest a primary jurisdiction referral to the FCC before the D.C. Circuit panel issued its opinion, and we do not think it is the right disposition now. Our point, rather, is that primary jurisdiction referrals are one way to deal with the situation – which this case does *not* present, though the D.C. Circuit insisted it *did* – in which the expert agency's view on a critical question is "anyone's guess." App., *infra*, 16a. And our further point is that the primary jurisdiction doctrine demonstrates that courts accept clarifications of agency positions *after* litigation is under way, rather than demand – as the D.C. Circuit seems to have done – a *prior* "clear statement (and analysis) by the agency" just because of "potential consequences to judicial dockets." App., *infra*, 16a.

The opinion below conflicts with a large body of law applying this doctrine. The panel majority's view – that a practice is not unjust or unreasonable unless the FCC has *already* determined that it is unjust or unreasonable – cannot be reconciled with the *existence* of the primary jurisdiction doctrine. A primary jurisdiction referral *presupposes* an unresolved question that requires the agency's special competence; if there is no such unresolved question, primary jurisdiction referral is unnecessary and inappropriate. See, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, (1976) (reversing primary jurisdiction referral of common-law tort claims because those claims did not turn on whether practice was unfair or deceptive under Federal Aviation Act); *Brown* v. *MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002) (dismissal of Section 207 case on primary jurisdiction grounds, merely because claim related to a tariff, reversed; primary jurisdiction referral is required only if a claim presents "an issue of first impression, or * * * a particularly complicated issue that Congress has committed to a regulatory agency"); *Nat'l Comm'ns Ass'n, Inc.* v. *AT&T*, 46 F.3d 220 (2d Cir. 1995) (primary jurisdiction referral in Section 201(b) case reversed because case did not present policy question that required agency expertise or entail a risk of inconsistent interpretations); *Pac. Tel. & Tel.* v. *MCI Telecommunications Corp.*, 649 F.2d 1315 (9th Cir. 1981) (summary judgment, entered by district court in Section 201(b) case after FCC determined that practice was lawful, reversed when FCC undertook reconsideration of its prior decision). If the majority's view were correct, there would *never* be occasion for courts to make primary jurisdiction referrals.

This Court's decision in *Reiter* provides a clear illustration. The Interstate Commerce Act required carriers to charge "reasonable" rates and provided a right of action to recover damages from carriers if the ICC found that their rates were unlawful. The respondents in *Reiter* argued, much as the D.C. Circuit held here, that petitioners' claims were "not yet cognizable in court"

because petitioners did not secure a determination of unreasonableness from the agency before filing suit. 507 U.S. at 267-268. This Court rejected that argument. Even though a primary jurisdiction referral was required so that the agency could determine whether the rates were unreasonable, such a referral "does not deprive the court of jurisdiction," and therefore petitioners could pursue their claims in court. *Id.* at 268.

Although a primary jurisdiction referral can sometimes result in the dismissal of a case, any such dismissal must be "without prejudice" and can be entered only "if the parties would not be unfairly disadvantaged." *Reiter*, 507 U.S. at 268-269; see also *United States* v. *Michigan National Corp.*, 419 U.S. 1, 4-5 (1974). To dismiss litigation with prejudice because of purported uncertainty about agency views – rather than stay the litigation and allow the agency to makes its views known without cutting off parties' rights – is contrary to this Court's decisions and is error. See *Syntek Semiconductor Co., Ltd. v. Microchip Technology, Inc.*, 307 F.3d 775, 777 (9th Cir. 2002) (on reconsideration, ordering stay rather than dismissal pending primary jurisdiction referral because statute of limitations might preclude refiling of claim); *In re Long Distance Telecommunications Litigation*, 831 F.2d at 632 (reversing dismissal of 201(b) claims and ordering stay pending primary jurisdiction referral).

II. The Decision Deepens A Circuit Conflict On The Recurring Question Whether References To "Orders" In The Communications Act Encompass Rulemaking Orders

The court of appeals also held (in this instance, unanimously) that petitioners have no right of action under Section 207 to allege violations of Section 416, which imposes a "duty" on "every person * * * to observe and comply with" "[e]very order of the Commission." The court held that the term "order" in Section 416 refers only to adjudicatory orders and does not encompass rulemaking orders.

That holding adds to the confusion in the lower courts. The term "order" is not defined in the Act, but is used in a series of interrelated statutory provisions. See, *e.g.*, 47 U.S.C. § 401 (jurisdiction to enforce orders); *id.* § 402 (proceedings to set aside orders); § 408 (effective date of orders); *id.* § 416(c) (duty to obey orders). In *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942), this Court held that the term "order" in Section 402 encompassed regulations issued through the FCC's rulemaking process. "[I]t is the substance of what the Commission has purported to do and has done which is decisive." *Id.* at 416. The FCC's regulations were deemed an "order" because they were "adopted by the Commission in the avowed exercise of its rule-making power" and "have the force of law." *Id.* at 417.

Six circuits have followed that approach in holding that FCC rulemaking orders are "orders." See App., *infra*, 19a (referencing precedents from the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits). The First Circuit, however, while recognizing this Court's holding that an "order" under Section 402 could be a rulemaking order, nonetheless held that only adjudicatory orders could be "orders" under Section 401. *New England Telephone & Telegraph Co.* v. *Public Utilities Commission*, 742 F.2d 1 (1st Cir. 1984) (Breyer, J.).

The circuit split is compounded by the Ninth Circuit's *Metrophones* decision. That decision (applying *Hawaiian Tel. Co.* v. *Pub. Utilities Commission*, 827 F.2d 1264 (9th Cir. 1987)) held that the term "order" in Section 416(c) encompasses the rulemaking order that requires payment to PSPs. It also observed that "[i]t is technically true that § 416(c) makes a violation of any 'order' of the Commission a violation of the statute itself." 423 F.3d at 1071. But then it concluded that it was unreasonable for the FCC to interpret Section 416(c) in accordance with the literal language of the statute: "[T]o hold that §§ 206 and 207 encompass all violations of § 416(c) would

render superfluous the requirement that an action under § 206 allege a violation of a *statute*." *Ibid.* (emphasis in original).

That reasoning makes no sense. If the language in Section 416 requires or permits the term "order" to be construed to encompass rulemaking orders, as the Ninth Circuit recognizes, it is the unambiguous language of the *statute* – not the FCC's construction of the statute – that makes a violation of "every" order a violation of the Act. That reading of Section 416 does not mean that every violation of a regulation gives rise to a right of action under Sections 206 and 207, and does not make those sections superfluous.[13] It simply means, as the statute plainly says, that there is a duty to comply with all FCC orders, not merely to comply with some orders. Since it is "technically true" (and hardly surprising) that this is what the statute requires, the FCC's interpretation of the statute – which was reiterated in its brief in this case (FCC Br. 14) – is at least a permissible interpretation, if not the *only* permissible interpretation.

Regardless of the merits, the conflicting interpretations of the Act generate confusion and inconsistency. There are now at least three conflicting views in the courts of appeals – the D.C. and First Circuits' view that "order" does not encompass rulemaking orders; the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits' view that "order" does encompass rulemaking orders; and the Ninth Circuit's view that "order" encompasses rulemaking orders, but that it is unreasonable to construe "every"

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[13] Sections 206 and 207 create a right of action only against common carriers (not against other parties that violate FCC regulations); only if the plaintiff suffers damages; and only if the damages are suffered "in consequence of" the violation. Because of these requirements, most violations of FCC rules are not redressable in court. Indeed, even though it has been clearly established in six circuits that rulemaking orders are "orders" under the Act, very few cases alleging violations of FCC rules have been filed in those circuits.

order to mean "every" order, in light of Section 206. Certiorari should be granted to end this confusion.

III. The D.C. Circuit's Decision That An IXC Cannot Violate Section 276 Conflicts With This Court's Decision In *Alexander* v. *Sandoval*

The court also failed to acknowledge the FCC's contrary interpretation of the statute when it held (unanimously) that PSPs have no right of action to allege violations of Section 276. That holding was based largely on the court's distinction between a violation of the Act (which is required to invoke the right of action under Section 207) and a violation of FCC regulations. Section 276, the court suggested, "is by its terms addressed neither to the rights of PSPs nor to the obligations of IXCs." App., *infra*, 13a-14a. "Because the IXCs are not regulated by § 276, there is no way in which they could have violated that provision." App., *infra*, 14a. The court's reasoning rests on a misreading of *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), and a failure to apply *Chevron* principles when defining rights of action to enforce statutes and regulations.

Under the proper reading of *Sandoval* and *Chevron*, the distinction between the Act and FCC regulations is a distinction that makes no difference. Both the Ninth Circuit (in *Greene*) and the D.C. Circuit (in this case) correctly recognized that "rights-creating language" in a statute supports a right of action. Section 276 contains such language. Congress could hardly have expressed more clearly its judgment that PSPs are entitled to fair compensation for every call. Section 276 states that "the Commission *shall* take *all actions necessary* * * * to prescribe regulations that (A) establish a per call compensation plan to *ensure* that *all* payphone service providers are fairly compensated for *each and every* completed intrastate and interstate call" (emphasis added). Unlike TOCSIA, which delegated discretion to the FCC to "consider" whether compensation was needed, Section 276 expresses an unambiguous congressional determi-

nation that *all* PSPs *must* be compensated, and for *every* call. See App., *infra*, 86a-88a. A compensation plan that did not satisfy those requirements could not pass muster under Section 276. And Section 206 establishes liability (enforced through the private right of action in Section 207) if a carrier does anything "declared to be unlawful" or fails to do things "required to be done" by the Act.

The observation that Section 276 does not specify *who* must pay compensation is irrelevant. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-844. Thus, the distinction between violations of the regulations and violations of the Act is an illusion in this context. As *Sandoval* explained, "[I]t is * * * meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U.S. at 284.

The cause of action asserted here is very different from the cause of action that was denied in *Sandoval*, where the plaintiffs sought to enforce disparate-impact regulations pursuant to a right of action to enforce 42 U.S.C. § 601, which prohibited only intentional discrimination. *Sandoval* rests on the point that "the disparate-impact regulations do not simply apply § 601–since they indeed forbid conduct that § 601 permits – and therefore * * * the private right of action to enforce § 601 does not include a private right to enforce these regulations." 532 U.S. at 285. The Court made clear that *regulations* addressing intentional discrimination – the conduct addressed in Section 601 – could be enforced under a right of action to enforce *the statute*: "We do not doubt that regulations applying § 601's ban on

intentional discrimination are covered by the cause of action to enforce that section [because] [s]uch regulations * * * authoritatively construe the statute itself." *Id.* at 284.

The same logic should control this case. The FCC's payphone rules do no more than Congress required, when it demanded compensation for every payphone call. The regulations authoritatively construe the requirements of Section 276 and here, as in *Sandoval*, it is "meaningless" to distinguish between a violation of that section and a violation of regulations that authoritatively construe that section. The FCC's refusal to draw that meaningless distinction, and its determination that a violation of its rules is a violation of Section 276 is a reasonable interpretation of the statute that is entitled to deference.

Although no judge of a court of appeals has yet accepted the argument that there is an express private right of action to enforce Section 276 and its implementing regulations, this Court should grant certiorari to decide whether *any* provision of the Communications Act allows these lawsuits to proceed. The Court should not confine its attention to the statutory provisions on which there are circuit splits. First, the misinterpretation of *Sandoval* that underlies the reasoning of both the court below and the Ninth Circuit in *Greene* deserves correction by the Court that wrote the misinterpreted *Sandoval* opinion, lest that misunderstanding create even more erroneous judgments (with respect to this and other statutes) in the courts of appeals. Second, if any one provision of the Communications Act is construed (in conjunction with Sections 206-207) to allow this action to proceed, construction of the other provisions will become unnecessary, and this Court should not artificially exclude from consideration the very statute in which Congress focused on the problem being litigated, namely the nonpayment of PSPs for dial-around calls. If the Court grants certiorari, it should consider whether the Communications Act – not just Section 201(b) or Section 416(c) – supports a private right of action for PSPs.

IV. Confusion And Inconsistency In Lower Court Decisions Threatens The Development And Administration Of A Coherent Regulatory Regime To Achieve Congressional Objectives

This Court should grant certiorari to address the palpable confusion and inconsistency in the lower courts' decisions. In the Ninth Circuit, PSPs can sue in federal court by alleging a violation of Section 201(b). In the D.C. Circuit, they cannot. In the D.C. Circuit, though, they apparently can take their complaint to the FCC, even though the statute that authorizes damage actions at the FCC states unambiguously that complaints may be filed at the FCC *or* in federal court.

In the First Circuit and the D.C. Circuit, PSPs cannot sue by alleging a violation of Section 416(c) because, in those circuits, a rulemaking order is not an "order." In the Ninth Circuit, they cannot sue because, even though an "order" is an "order," apparently "every" order cannot mean "every" order. In the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, PSPs presumably can sue under Section 207 by alleging violations of Section 416(c) – unless one or more of those circuits follows the Ninth Circuit's lead to hold that it is unreasonable for the FCC to construe the Act in accordance with its plain language.

Even within individual circuits, confusion reigns. One Ninth Circuit panel, in *Greene*, held that the need for a "coherent national communications policy" is reason to deny a right of action to sue under Section 276, lest "interpretation of a finely-tuned regulatory scheme" rest in the hands of "judges, instead of in the hands of the Commission." 340 F.3d at 1053. Of course, *judges* reached that conclusion without even considering the conclusion of the FCC – the agency responsible for developing and administering a coherent national policy – that there *is* a right of action under Section 276. When a different Ninth Circuit panel considered the FCC's views in *Metrophones*, it held that "the ability of PSPs to recover compensation * * * in

private actions [is] integral to the proper functioning of the payphone compensation system." 423 F.3d at 1066. *That* panel, though, refused to defer to the FCC's construction of Section 416(c) – a construction that was consistent with the Ninth Circuit's precedent in *Hawaiian Telephone Co.* – at the same time that it extended deference to the FCC's construction of Section 201(b) in its 2003 Order – an order whose construction of Section 276 contradicted Ninth Circuit precedent.

The FCC's construction of Section 201(b), which the Ninth Circuit accepted, relied on the D.C. Circuit's conclusion that PSPs may recover damages under Sections 206-207. That interpretation received deference from the Ninth Circuit, but the D.C. Circuit would not even acknowledge the existence of the order – even though it adopted and relied on the D.C. Circuit's own prior decision. And the closest the D.C. Circuit came to an articulated reason for that disregard was the FCC's failure to explain a policy judgment made by *Congress*: that plaintiffs may sue in federal court, as well as complain to the FCC, when the Act is violated. Even where there is not yet a conflict between circuits – in the interpretation of Section 276 – the lower courts have misconstrued *Sandoval* in a manner that will frustrate clearly expressed congressional policy.

The confusing and conflicting rulings will seriously impede the FCC's efforts to develop and administer a coherent regulatory regime to achieve the objectives that Congress demanded. A refusal to permit lawsuits to recover unpaid compensation implicates both the substance and the enforcement of the FCC's compensation plan. The FCC has already made two critical substantive decisions in the design of its compensation plan – concerning the amount of compensation that should be paid for every payphone call and the identity of the party responsible for payment – that have been based in large measure on the FCC's belief that private suits for damages could be used to recover compensation if IXCs refused to obey the Commission's rules.

And, whatever the substance of the FCC's rules, the plan cannot succeed if IXCs can disregard the rules with impunity because enforcement mechanisms are lacking. The FCC has already explained that its plan was designed with the assumption that judicial enforcement would be available. If that assumption is wrong, the FCC will undoubtedly need to revise its compensation plan, budget additional resources for its own enforcement efforts, or both.

The confusion in the lower courts also disrupts the business of providing payphone and long-distance calling services. Petitioners disagree with much that is said in the petition for certiorari that has been filed in *Metrophones*, but that petition correctly identifies business and litigation uncertainty that arises from conflicting lower court decisions. Many PSPs and IXCs operate nationwide businesses. Lawsuits to recover unpaid compensation have been filed in district courts throughout the country. Allowing the confusion to continue would impose large costs and produce few, if any, benefits. See 05-705 Pet. 10-13.

Amid all this confusion, the lower courts have lost sight of the principles that should govern here. Congress decided that PSPs must be compensated for each and every completed call; it delegated to the FCC the authority to devise a coherent national policy to effectuate that directive; the FCC has construed ambiguous statutory provisions to further that policy, and to operate in conjunction with unambiguous statutory provisions that the FCC reads to mean just what the language says. Failure to adhere to these principles leaves congressional policy in a shambles, and will deny to petitioners the compensation to which *Congress* declared them entitled for millions of calls.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2005

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 04-7034, 04-7035

APCC SERVICES, INC., et al.,

Appellees,

v.

SPRINT COMMUNICATIONS CO.,

Appellant.

Argued: Oct. 21, 2004.

Decided: June 28, 2005.

Before: GINSBURG, Chief Judge, and SENTELLE and RANDOLPH, Circuit Judges.

Opinion for the Court filed PER CURIAM.*

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* Chief Judge GINSBURG wrote Sections I, II.A, II.B.1, and II.B.3, and Circuit Judge RANDOLPH wrote Section II.B.2 of the opinion for the court. Circuit Judge SENTELLE dissents from Section II.A with respect to the

Opinion dissenting in part filed by Circuit Judge SENTELLE.

Dissenting opinion filed by Chief Judge GINSBURG.

PER CURIAM.

In these consolidated appeals, we consider whether chapter 5 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-615b, creates a private right of a tion for an owner or operator of a payphone (hereinafter a payphone service provider, or a PSP) to recover from an interexchange carrier (IXC) the compensation for coinless payphone calls required by a regulation of the Federal Communications Commission. Before answering that question, however, we must first decide whether the plaintiffs, as the assignees of PSPs' claims against the IXCs, have standing to sue them. We conclude the plaintiffs do have standing but the Act does not provide them a right to sue in federal court.

I. Background

In 1990 the Congress enacted the Telephone Operator Consumer Services Improvement Act, Pub.L. No. 101-435, 104 Stat. 986 (codified at 47 U.S.C. § 226), which requires PSPs to allow consumers to use an access code (e.g., "10-10-220") or a subscriber 800 number to make a call from a payphone. *See* 47 U.S.C. § 226(c)(1)(B). Before then, many PSPs had blocked the use of access codes and 800 numbers because they enabled customers to "dial around" the PSP's preselected IXC, with the result that neither the IXC nor the PSP received any payment for the call.

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standing of the plaintiff aggregators but concurs in the judgment. Chief Judge GINSBURG dissents from Section II.B.2 and from the judgment.

In its initial implementation of the Act, the Commission required IXCs to compensate PSPs only for access code calls, not for calls to subscriber 800 numbers, *see Policies and Rules Concerning Operator Services Access and Pay Telephone Compensation,* 6 F.C.C.R. 4736 ¶¶ 34, 36, 1991 WL 638196 (1991), *clarified on recons.,* F.C.C.R. 4355 ¶ 50, 1992 WL 690067 (1992), but we held that compensation scheme was not fully consistent with the 1934 Act, 47 U.S.C. § 226(e)(2), and had to be reconsidered. *Fla. Pub. Telecomms. Ass'n, Inc. v. FCC,* 54 F.3d 857, 859 (D.C.Cir.1995). Then, in the Telecommunications Act of 1996, the Congress instructed the Commission to devise a new plan that would "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone [s]." 47 U.S.C. § 276(b)(1)(A). After several failed attempts, *see Ill. Pub. Telecomms. Ass'n v. FCC,* 117 F.3d 555, 558 (D.C. Cir. 1997) and *MCI Telecomms. Corp. v. FCC,* 143 F.3d 606, 607 (D.C.Cir.1998), the Commission finally crafted such a plan. *See Am. Pub. Communications Council v. FCC,* 215 F.3d 51, 52 (D.C. Cir. 2000) (upholding the plan). Getting the Commission to enact a regulation requiring IXCs to compensate them for dial-around calls was only half the battle for the PSPs, however; their challenge now is to collect.

Most PSPs rely upon "aggregators" to act as intermediaries between themselves and the several IXCs; an aggregator acting on behalf of a PSP submits billing information to the IXCs and pays over to the PSP the monies it receives from the IXCs. The aggregator charges the PSP a fee based upon the number of telephone lines that PSP operates. Plaintiff American Public Communications Council Services (APCCS) is the largest aggregator, representing more than 1400 PSPs, which in turn own and operate more than 400,000 payphones nationwide.

APCCS and several other plaintiff aggregators represent that certain IXCs "have failed to pay the required [dial-around] compensation for millions of calls placed over several years." They sought authorization from their client PSPs to sue IXCs on the PSPs' behalf, and agreed to pass back to the PSPs any amounts they recovered thereby. Each PSP then signed an "Assignment and Power of Attorney" providing, in relevant part, that the PSP

> assigns, transfers, and sets over to [the aggregator] for purposes of collection all rights, title and interest of the [PSP] in the [PSP's] claims, demands or causes of action for "Dial-Around Compensation" ("DAC") due the [PSP] for periods since October 1, 1997, pursuant to Federal Communications Commission rules, regulations and orders.

The aggregators, purporting to act "as assignee[s] of the claims of and attorney[s]-in-fact" for the PSPs, then jointly filed lawsuits against Sprint, AT & T, and other IXCs, claiming each IXC had violated the Commission's dial-around compensation regulation. One PSP, Peoples Telephone Company, also participated in the lawsuits as a co-plaintiff.

AT&T moved to dismiss the cases on the ground the aggregators lacked standing to sue. The district court initially agreed and dismissed all the claims of the aggregators, *APCCS v. AT & T Corp.*, 254 F.Supp.2d 135, 137 (D.D.C.2003), but upon the aggregators' motion for reconsideration, vacated its earlier ruling and denied AT & T's motion. 281 F.Supp.2d 41, 45 (D.D.C.2003).

Another IXC, Cable & Wireless, moved to dismiss the single complaint against it on the grounds that the aggregators lacked not only standing but also a right of action for

dial-around compensation under § 276 of the Act and the implementing regulation promulgated by the Commission. The district court denied that motion and permitted the plaintiffs to amend their complaints to assert that §§ 201(b), 407, and 416(c) of Title 47 provide alternative grounds for relief. *APCCS v. Cable & Wireless, Inc.*, 281 F.Supp.2d 52, 57 (D.D.C.2003). (Cable & Wireless thereafter filed for bankruptcy and the case against it was stayed.) At the instance of Sprint and AT & T, the district court then certified its orders for interlocutory appeal, *APCCS v. Sprint Communications Co.*, 297 F.Supp.2d 90, 101 (D.D.C.2003); *APCCS v. AT& T Corp.*, 297 F.Supp.2d 101, 110 (D.D.C.2003), and we consolidated their appeals.

II. Analysis

Our review is *de novo*. We assume the factual allegations in the complaints are true. *See Greene v. Dalton*, 164 F.3d 671, 674 (D.C.Cir.1999). Because Article III standing is a jurisdictional requirement, we begin our analysis there. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-102, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998).

A The Aggregators' Standing

Sprint and AT & T argue the aggregators lack standing to sue because they do not have "a concrete personal stake in the litigation." As these IXCs see things, the aggregators' "skeletal and conditional" assignments from the PSPs are insufficient to confer standing because they transfer only "bare legal title" to the claims of the PSPs, that is, the right to sue "for purposes of collection" but not the right to the recovery. Here the IXCs point out that the aggregators have promised to return to the PSPs all the proceeds from the litigation.** Further, they

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** Even if the IXCs are correct that the aggregators do not have standing as

contend the assignments, notwithstanding their terms, are in fact "completely revocable" by the PSPs.

In terms of the "irreducible constitutional minimum" requirements for standing--injury-in-fact, causation, and redressability, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) – the IXCs first argue the aggregators have not suffered any injury of their own, and the assignments do not confer upon the aggregators the right to assert the injury of the PSPs. The IXCs also argue the relief the aggregators seek would not redress their purported injury because the aggregators would not keep any portion of such damages as may be awarded.

There are some circumstances in which a plaintiff has standing to sue based upon an injury to someone else. Indeed, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), the Supreme Court stated in no uncertain terms that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor." At the same time, however, the Court said that the assignee must have a "concrete private interest in the outcome of the suit" that is related to the injury asserted. *Id.* at 772, 120 S.Ct. 1858.

Therefore, in order to determine whether the aggregators have standing, we must first determine the effect of the assignments, which purport to transfer to them "all rights, title

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assignees, we note that Peoples Telephone Company, a PSP, and two aggregators, Jaroth, Inc. and NSC Telemanagement, would still have standing. Jaroth contends it owned a 17% interest in a PSP at the time the lawsuit was filed, and NSC contends it will receive 10% of any compensation it collects on behalf of an affiliated PSP. Part II.A, therefore, deals with the standing only of those aggregators whose interest in the lawsuit stems solely from an assignment.

and interest" in the PSPs' dial-around compensation claims. We must then determine whether the aggregators have a stake in the outcome of the suit, notwithstanding their contractual obligation to account to the PSPs for any award of damages.

1. The assignments

Sprint and AT & T offer two reasons to believe the assignments did not transfer the PSPs' compensation claims to the aggregators so as to give the aggregators standing to sue. First, the transferred ownership interest was only "for purposes of collection." Second, the assignments were "completely revocable" by the PSPs.

We need not dwell upon the IXCs' first argument The quoted phrase appears in the following context: "[The PSP] hereby assigns, transfers and sets over to [the aggregator] for purposes of collection all rights, title and interest of [the PSP] in [the PSP's] claims, demands or causes of action" for dial-around compensation. The phrase "for purposes of collection," which the IXCs portray as a fatal limitation, we think a mere reflection of the aggregator's promise to pass back to the PSP whatever it is able to collect. Whether that obligation affects the aggregator's standing is a distinct question, which we consider in Part II.A.2 below, but it certainly does not affect the validity of the assignment of the PSP's dial-around compensation claim. The IXCs, therefore, give us no reason to believe the assignment is anything less than a complete transfer to the aggregator of the PSP's dial-around compensation claim.

Equally unavailing is the IXCs' contention that the assignments are "completely revocable." By their terms, the assignments "may not be revoked without the written consent of [the aggregator]." Sprint and AT & T suggest the court should treat this provision as a mere "formality," because APCCS sent

to each of its client PSPs a letter stating: "If at any point APCCS is no longer representing you in the litigation, you will be able to pursue your claims on your own, should you so choose." The possibility that APCCS would no longer represent a PSP in litigation does nothing, however, to suggest the PSP could revoke the assignment as long as APCCS continues to represent the PSP in the litigation. Of course, APCCS itself could repudiate the assignment and presumably would do so if it no longer wanted to represent the PSP in the litigation. In any event, the assignment itself is plain: the PSP may not revoke it without the consent of the aggregator.

Having rejected both the IXCs' arguments challenging the effect of the assignments, we turn to the question whether the aggregators' promise to pass along the proceeds of litigation affects their standing to sue.

2. Pass back of the proceeds

Sprint and AT & T also argue the aggregators lack standing because the assignments effectively give them only the right to sue; the aggregators will reap no direct financial benefit from the suit. In that respect, Sprint and AT & T argue, the interest of the aggregators in this case is unlike that of a *qui tam* relator, whose standing the Supreme Court upheld in *Vermont Agency*, 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836. Here, the IXCs argue, the aggregators retain "no genuine economic interest" in the dial-around compensation claims as a result of their promises to pay the proceeds to the PSPs, whereas a *qui tam* relator benefits from the bounty he receives if his claim is successful. *Id.* at 772, 120 S.Ct. 1858.

According to the IXCs, this case is better compared to *Connecticut v. Physicians Health Services of Connecticut, Inc.*, 287 F.3d 110 (2002), in which the Second Circuit held that the

State of Connecticut lacked standing to assert claims against an insurance company offering managed care plans to Connecticut residents. The State claimed standing on the ground that several plan participants had assigned to the State their right to seek "appropriate equitable relief with respect to any cause of action they may have as plan participants or beneficiaries." *Id.* at 112. The Second Circuit concluded that Connecticut did not have a "concrete private interest in the outcome of the suit" because "[n]one of the remedies being sought would flow to the State as assignee." *Id.* at 118. The assignments at issue did not "confer 'actual' rights or benefits * * * on the State. The right to recover benefits or to seek money damages remain[ed] with the assignor." *Id.* at 115. Therefore, the court held that, "[e]ven if the assignments are valid as a contractual matter, they * * * merely give the State the right to act as a nominal party." *Id.* at 118.

The assignments at issue here, in contrast, transfer to the assignees the entire interest of the PSPs in their dial-around compensation claims, and, as explained in Part II.A.1 above, there is nothing to suggest the assignments were invalid. As for the question that remains – whether the aggregators' promise to hand over any recovery to the PSPs means the aggregators have no stake in the case – *Physicians Health* is not helpful; it did not address the question whether an assignee that would otherwise have standing to sue loses its standing when it obligates itself to give the proceeds of the suit to another.

Still, we are not entirely without guidance. As the district court observed, the identical issue has arisen under Federal Rule of Civil Procedure 17(a): "Every action shall be prosecuted in the name of the real party in interest." Courts and commentators agree that, if an assignment properly transfers ownership of a claim, then the assignee's interest "is not affected by the parties' additional agreement that the transferee will be

obligated to account for the proceeds of a suit brought on the claim." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir.1997); *see also Titus v. Wallick*, 306 U.S. 282, 289, 59 S.Ct. 557, 83 L.Ed. 653 (1939) (legal effect of assignment "was not curtailed by the recital that the assignment was for purposes of suit and that its proceeds were to be turned over or accounted for to another"); James Wm. Moore, et al., Moore's Federal Practice § 17.11[1][c] (3d ed. 1997) ("The assignee is real party in interest even though assignee must account to the assignor"); 6A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 1545 at 348 (1990) ("[F]ederal courts have held that an assignee for purposes of collection who holds legal title to the debt * * * is a real party in interest even though the assignee must account to the assignor for whatever is recovered in the action").

Sprint and AT & T counter with the observation that Rule 17(a) and the requirement of standing "are governed by different standards and serve distinct purposes." That is true enough, as far as it goes: Standing depends in part upon elements "clearly unrelated to the rather simple proposition set out in Rule 17(a)," Fed. Prac. & Proc. § 1542 at 330. But standing also depends in part, as does a plaintiff's status as the real party in interest, upon having "a personal interest in the controversy," *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir.1992), and that is the only requirement at issue in the IXCs' challenge to the aggregators' standing in this case.

We see no basis for distinguishing the personal stake required under Rule 17(a) from the interest required for standing. What the aggregators have promised to do with any recovery is irrelevant to their standing – as it would be to their status as real parties in interest. We need only be satisfied that the aggregators received a valid assignment of the claims, so

that any damage award will be payable to them in the first instance. Upon that score the IXCs have cast no doubt.[***]

B. Private Right of Action

Sprint and AT & T contend that nothing in chapter 5 of the Communications Act authorizes a PSP to sue an IXC for failure to pay the dial-around compensation required by the regulation the Commission promulgated to implement § 276. In determining whether the Act creates a private right of action, the court's task is straightforward: We must "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy," for "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).

1. Section 276

Section 276(b)(1) provides in relevant part:

> In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public * * * the Commission shall * * * prescribe regulations that – (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone.

[***] Because we conclude the aggregators have standing as assignees, we need not consider their alternative claim, which is that they have associational standing. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 344, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002).

As the plaintiffs acknowledge, § 276 itself does not create a private right of action; nor does it hold a common carrier liable for failing to comply with the requirements of the Act. According to the plaintiffs, however, those gaps are filed by §§ 206 and 207, respectively.

Section 206 provides in relevant part:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in [chapter 5] prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in [chapter 5] required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of [chapter 5].

And § 207 provides in relevant part:

> Any person claiming to be damaged by any common carrier subject to the provisions of [chapter 5] * * * may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of [chapter 5], in any district court of the United States of competent jurisdiction.

The question, then, is this: According to the allegations of the complaint, did Sprint and AT & T, which are common carriers, do something made unlawful by, or fail to do something required by, § 276? If so, then § 206 makes them liable to any person injured as a result, and § 207 permits "any person claiming to be damaged" to sue them in federal court.

The district court reasoned that § 276(b)(1)(A) "confers upon PSPs a right to be 'fairly compensated,' " while the Commission's regulation "provides the details necessary to implement" that statutory right – namely, who must compensate the PSPs, and by how much. 281 F. Supp. 2d at 56. According to the district court, the regulation "implements the Congressional mandate * * * by specifying what it means to be 'fairly compensated'; as such, when a common carrier violates the regulation, it is effectively doing something 'declared to be unlawful' within the meaning of section 206 and is therefore subject to suit under section 207." *Id.*

In *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (2003), another case brought by aggregators against IXCs on behalf of PSPs, the Ninth Circuit read the same statute quite differently. That court first observed that § 276 "does not establish a right to compensation, or to compensation by IXCs. The statute does not say 'PSPs shall be entitled to fair compensation,' or 'IXCs shall pay PSPs.' " Viewing the "lack of rights-creating language in § 276 [as] crucial," the court held that, when an IXC fails to pay a PSP the compensation prescribed by the Commission, "there is no violation of the Act to be remedied through the private right of action afforded by §§ 206 and 207." *Id.* at 1050-52.

We join the Ninth Circuit in holding that § 276 does not create a right of action for a PSP (or its assignee) to recover dial-around compensation from an IXC. As our sister circuit observed, the Supreme Court in *Sandoval* held that § 602 of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d-1, did not reflect an intent on the part of the Congress to create a private right of action specifically because there was no "rights-creating language" in the statute. 532 U.S. at 288, 121 S.Ct. 1511. The same is true of § 276 of the Communications Act. That section is by its terms addressed neither to the rights of PSPs nor to the

obligations of IXCs. Rather, it is "yet a step further removed: It focuses * * * on the agenc[y] that will do the regulating." *Id.* Section 276 is addressed only to "the Commission," which it directs to "take all actions necessary * * * to ensure that all [PSPs] are fairly compensated" for the calls they originate.

Nothing in the statute requires the Commission to designate the IXC as the party responsible for dial-around payment. Indeed, as the IXCs note, the Commission identified the caller and the recipient as possible payors, and in fact it considered a "caller pays" scheme before eventually concluding that a "carrier pays" scheme was more practical. *See Notice of Proposed Rulemaking, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 F.C.C.R. 6716 ¶ 24, 1996 WL 436930 (1996); *see also Greene*, 340 F.3d at 1051 n. 3 (discussing alternative schemes the Commission considered).

Because the IXCs are not regulated by § 276, there is no way in which they could have violated that provision. They may have violated a regulation implementing § 276, but § 206 makes a common carrier liable only for violating chapter 5 itself--not for a violating a regulation issued by the Commission pursuant to chapter 5. Because it is not a violation of § 276 for an IXC to fail to pay dial-around compensation to a PSP, the plaintiffs do not have a right of action, based upon that section, against the IXCs.

2. Section 201(b)

Plaintiffs contend that even if they cannot rely on § 276, a common carrier's failure to comply with the Commission's regulations violates § 201(b) of the Act, which in turn triggers the provisions (§§ 206 and 207) allowing suit in federal court. Section 201(b) provides that any "charge, practice,

classification, or regulation that is unjust or unreasonable is declared to be unlawful." A common carrier's failure to compensate PSPs for dial-around calls, plaintiffs argue, is a "practice" that is "unjust or unreasonable," and therefore "unlawful" under the Act.

At the heart of plaintiffs' argument is the notion that it is inherently an unreasonable practice, within the meaning of § 201(b), to violate a Commission regulation. That reading would transform § 201(b) into a catchall provision, converting any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court. This result is not plainly evident from the text of the Act, and nothing suggests that Congress intended its words to have such a sweeping effect.

It is important to keep in mind that the question here is not so much whether there is a private right of action, but where--directly in district court, or in the Commission. This is different from *Sandoval*, in which the alternative to a right of action in court was no action anywhere. Still *Sandoval* has something to say about the issue facing us, if only in dicta: "[W]hen a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable." 532 U.S. at 291, 121 S.Ct. 1511.

Here, the body of the FCC's 1999 "Order" said not a word about § 201(b). All we see is boilerplate in the ordering clause, and in the clause identifying the authority for Part 64 of the rules, citing a list of sections including "201." (This is in marked contrast to the treatment of § 276, which the Commission mentioned throughout as the source of its authority.) It cannot be that the mere citation of § 201 displays

– in *Sandoval's* words – an intent that the regulation setting the compensation level should be privately enforceable in court. Still less can it be that the mere citation of § 201 is entitled to Chevron deference as the agency's authoritative interpretation of § 201(b). The dissent's quotation of the following statement from *Sandoval* is therefore inapposite: a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U.S. at 284, 121 S.Ct. 1511. There was no authoritative interpretation of § 201(b) in this case. For all we know, the Commission in 1999 never even thought about suits directly in district court. Certainly the body of the Order itself gave no clue that it did so. In fact, in some of the paragraphs talking about the PSPs compensating the carriers for overpayments, the assumption appears to be that collection actions will be before the Commission (as indeed they must be in an any action by a carrier against a PSP for not making a refund). *See, e.g., In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 F.C.C.R. 2545 ¶¶ 195-99, 1999 WL 49817 (1999).

A court should be reluctant to put words in the Commission's mouth – here, the words "unjust and unreasonable." The Commission never, in its 1999 Order, specified that a carrier's failure to pay was of this magnitude. Given the potential consequences to judicial dockets of the Commission's making that finding, we should require a clear statement (and analysis) by the agency. What the Commission meant by citing § 201 at the end of its Order is anyone's guess. If the Order itself indicated that the Commission expected payphone providers to be able to collect in judicial actions that would be another matter. But nothing in the Order so indicates and as stated above, there is at least a suggestion that the Commission expected collection actions to be administrative.

See, e.g., Ascom Communications, Inc. v. Sprint Communications, Inc., 15 F.C.C.R. 3223, 3237, 2000 WL 135252 (2000) (adjudicating a claim against Sprint for a violation of § 201(b)).

The dissent also invokes our decision in *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir.1995), but the holding of that case is too narrow to be of any help in this case. *MCI*, as well as the line of precedent on which it relied, did not involve Commission prescriptions in general, but rather referred specifically to ratemaking under § 205. *Id.* at 1414. The Commission's ratemaking power is expressly defined as the authority "to determine and prescribe what will be the just and reasonable charge." 47 U.S.C. § 205(a) (emphasis added). It is one thing to hold that when Congress instructs the Commission to set a "just and reasonable" rate for common carriers, their noncompliance with the rate will be considered "unjust and unreasonable"; it is quite another to extend that reasoning to encompass all Commission regulations governing common carriers. In addition, *MCI* involved claims brought before the Commission – not in a federal district court. When *MCI* is viewed in the new light of *Sandoval*, its value as a precedent in this case is diminished still further.

We do not say that the Commission has no power to interpret § 201(b) to encompass violations of its rules, and thereby to create private rights of action in courts when previously there were none. We do say the Commission did not attempt to exercise any such power here. Plaintiffs therefore cannot proceed under § 201(b).

3. Sections 407 and 416(c)

The plaintiffs next look to 47 U.S.C. §§ 407 and 416(c) to supply the right to sue the IXCs in federal court. Section 407

authorizes a "complainant" to petition the district court for damages based upon a carrier's failure "to comply with an order for the payment of money within the time limit in such order." The plaintiffs contend the regulation providing for dial-around compensation is such an "order."

In the alternative, the plaintiffs contend § 416(c), read in conjunction with §§ 206 and 207, gives them a right of action. That provision states, "It shall be the duty of every person * * * to observe and comply with [every order of the Commission] so long as the same shall remain in effect." According to the plaintiffs, the compensation regulation is also an "order" within the meaning of § 416(c), and §§ 206 and 207 make the failure to comply therewith actionable in federal court.

The IXCs argue in response that the regulation at issue is not an "order" within the meaning of either § 407 or § 416(c) because that term, as used in those sections, includes only Commission decisions arising out of an adjudicatory, as opposed to a rulemaking, proceeding. They argue that to interpret "order" to include rulemaking decisions makes no sense in light of § 416(a), which requires that every order be served upon the carrier's designated agent, and of § 416(b), which authorizes the Commission "to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

We agree with the IXCs that "order" in §§ 407 and 416(c) refers only to adjudicatory and not to rulemaking decisions. Although the Communications Act does not define the term "order," the Administrative Procedure Act does: " 'order' means the whole or part of a final disposition * * * of an agency in a matter other than a rule making." 5 U.S.C. § 551(6). We recognize that the circuits are divided over the question whether "order" as used in § 401(b), a companion provision to those at issue here, includes a decision promulgated through rulemaking. The Ninth Circuit has held that it does, reasoning that "[w]hen

Congress intended the APA's definition of a term to be incorporated into the Communications Act, it said so." *Hawaiian Tel. Co. v. Pub. Utilities Comm'n of Hawaii*, 827 F.2d 1264, 1271 (9th Cir.1987); *see also Alltel Tennessee, Inc. v. Tennessee Pub. Serv. Comm'n*, 913 F.2d 305, 308 (6th Cir.1990) (following *Hawaiian Tel. Co.* and citing cases from 4th, 5th, 7th, and 8th Circuits).

We are persuaded otherwise for the reasons laid out at length by then-Judge Breyer in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 4-9 (1st Cir.1984) (relying in part upon APA definition of "order" in concluding § 401(b) is limited to "adjudicatory orders"). We are particularly convinced that, as the First Circuit said of that provision, making §§ 407 and 416(c) applicable to Commission regulations would "interfere seriously with the well established principle that the 'enforcement' of the Communications Act is entrusted primarily to" the FCC, *id.* at 5, rather than to the district courts.

Further, the plaintiffs' reading of §§ 407 and 416(c) would render § 201(b) superfluous: any failure to comply with a regulation, not only unjust and unreasonable practices, would be a violation of the Act and therefore actionable under §§ 206 and 207. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n. 13, 124 S.Ct. 983, 157 L.Ed.2d 967 ("It is * * * a cardinal principle of statutory construction that a statute ought, upon the whole, be so construed that * * * no clause, sentence, or word shall be superfluous, void, or insignificant"). And, to those provisions of § 416 that the IXCs correctly identify as inconsistent with the plaintiffs' broad interpretation of "order," we add § 415(f), the one year statute of limitations for filing a petition to enforce a Commission order for the payment of money. If orders included regulations, then a complainant would be able to seek enforcement of a regulation only for the first year after it is promulgated. That simply cannot be.

For these reasons, and because we agree entirely with the First Circuit's analysis in *New England Telephone and Telegraph*, we reject the plaintiffs' contention they can sue the IXCs pursuant to §§ 407 and 416(c).

III. Conclusion

We hold that, as a result of the PSPs' valid assignment of their claims to the plaintiff aggregators, the aggregators have standing to sue the defendant IXCs for failing to pay the PSPs dial-around compensation as required by the regulation; that the aggregators have promised to pass back to the PSPs any recovery from the lawsuit is immaterial for the purpose of determining their standing. We also hold that none of the provisions of the Act upon which the plaintiffs rely grants them the right to sue in federal court to recover dial-around compensation the IXCs are required by regulation to pay. The orders of the district court denying the IXCs' motion to dismiss are therefore

Reversed.

SENTELLE, Circuit Judge, concurring in part and dissenting in part.

In considering whether the plaintiff aggregators have standing to sue, I, like the Court, begin with the same basic question: "We must * * * determine whether the aggregators have a stake in the outcome of the suit[.]" Maj. Op. at 1243. Because I conclude that most of the aggregators do not have a concrete private interest in the outcome of this suit, I must respectfully dissent from Part II.A of the Court's opinion.*

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* As noted by the Court, Maj. Op. at 1242 n. **, this discussion only applies to those plaintiff aggregators that do not own, wholly or in part, PSPs.

The PSPs' assignment of rights to APCC is materially limited: "'[The PSP] hereby assigns, transfers, and sets over to [the aggregator] for purposes of collection all rights, title, and interest of [the PSP] in [the PSP's] claims, demands or causes of action' for dial-around compensation." What the Court sees as "a mere reflection" of a technical detail not affecting the substance of the relationship, I see as the first clue that the PSPs, not the aggregators, would be the only plaintiffs with a real stake in the outcome of this controversy.

The Supreme Court's statements on the "irreducible constitutional minimum" of standing, under Article III, are straightforward: first and foremost, the plaintiff "must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992) (quotation marks, footnote, and internal citation omitted). Of course, as this Court recognizes, the party that actually suffered the injury in the first instance need not be the party to bring suit; under *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, an assignee of the injured party's claim may have standing to sue. 529 U.S. 765, 771-74, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000).

The doctrine of assignee standing does not wholly erase the basic requirements of standing, however. There are "assignments," and then there are assignments. Only an assignment that gives the assignee an actual interest in the recovery is sufficient for standing.

The assignee standing doctrine recognized by the Supreme Court (and cited by this Court, Maj. Op. at 1243) clearly refers to an actual assignment of an interest that secures a portion of the recovery. *See Vermont Agency*, 529 U.S. at 773, 120 S.Ct. 1858 ("The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim."). The

cases cited in *Vermont Agency* as exemplifying "assignee standing" reflect this fact. *See Poller v. Columbia Broadcasting System, Inc.*, 284 F.2d 599, 602 (D.C. Cir.1960), *rev'd*, 368 U.S. 464, 465, 82 S. Ct. 486, 7 L.Ed.2d 458 (1962) (plaintiff in antitrust suit was assignee of all of the assets of the dissolved corporation (of which he was previously the sole shareholder)); *Hazeltine Research, Inc. v. Automatic Radio Mfg. Co.*, 77 F.Supp. 493, 495 (D. Mass.1948) (plaintiff in patent license suit was assignee of parent corporation's right to grant licenses under certain patents), *aff'd*, 176 F.2d 799 (1st Cir.1949), *aff'd*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950); *Manhattan Trust Co. v. Sioux City & N.R. Co.*, 65 F. 559, 568 (N.D. Iowa 1895) (intervenor assignee in suit at equity was entitled to redeem securities pledged by assignor to third party, upon assignee's payment of the loan proceeds to that third party), *aff'd sub nom. Hubbard v. Tod*, 76 F. 905 (8th Cir.1896), *aff'd*, 171 U.S. 474, 19 S. Ct. 14, 43 L.Ed. 246 (1898); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 531, 115 S. Ct. 2322, 132 L.Ed.2d 462 (1995) (plaintiff in contract dispute was subrogated pro tanto because, as injured party's insurer, it had paid injured party compensation that it would recover in contract parties' arbitration); *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 288, 113 S. Ct. 2085, 124 L.Ed.2d 194 (1993) (plaintiff in stock fraud suit was subrogated because, as injured party's insurer, it had paid injured party compensation that it would recover in civil suit). *See also Titus v. Wallick*, 306 U.S. 282, 286, 59 S. Ct. 557, 83 L.Ed. 653 (1939), quoted in Maj. Op. at 1244 (plaintiff assignee did have to account for the proceeds of the recovery and turn over the proceeds to the assignor, but assignor was obligated, under the terms of the assignment, "after paying the expenses of collection, to pay over one-half of the net recovery to [assignee's] wife, to discharge certain indebtedness of [assignee], and to pay the balance to [assignee].").

The cases cited in *Vermont Agency* as exemplifying the accepted doctrine of "assignee standing" share a common

characteristic noticeably absent from the case before us: in each of those cases the "assignment" gave the putative plaintiff a direct share in the recovery. This necessary characteristic renders those cases consistent with *Vermont Agency*'s requirement that the putative plaintiff have "a concrete private interest in the outcome of the suit" in order to attain standing. 529 U.S. at 772, 120 S. Ct. 1858 (quoting *Lujan*, 504 U.S. at 573, 112 S. Ct. 2130) (quotation marks & brackets omitted).

Under *Vermont Agency* (consistent with its foundation, Lujan), an assignee plaintiff must both (1) seek to vindicate the injury to the assignor, and (2) hold an interest "consist[ing] of obtaining compensation for, or preventing, the violation of a legally protected right." *Vermont Agency*, 529 U.S. at 772-73, 120 S. Ct. 1858. An assignment suffices for such an interest when the assignee actually receives the benefit of the compensation he receives. Where the "assignment" relationship is in substance a mere "agency" relationship such that the "assignee" enjoys no right to keep a part of the recovery, the irreducible constitutional minimum of standing is left unsatisfied.

In this case, the putative plaintiffs themselves recognize that the PSPs' assignment of rights to aggregators such as APCC gives them no share in the recovery. "The aggregators' compensation for billing and collection services is based on the number of payphones and telephone lines operated by their PSP clients." Br. for Plaintiffs-Appellees at 5-6. The aggregators are a pass-through entity: "Aggregators are intermediaries between PSPs and IXCs for billing and collection. An aggregator * * * collects the IXCs' payments, and distributes those payments to its PSP clients." *Id.* at 5.

The contract cited by the Court reflects the pass-through nature of the "assignee-assignor" relationship. True, according to one part of the Agreement, the PSPs "assign[ ] * * * for purposes of collection" the interest in Company's claims. But

we do not interpret the contract's individual phrases apart from the rest of the contract; rather, we interpret the agreement "as a whole," along with "all writings that are part of the same transaction." *See* Restatement (Second) of Contracts § 202(2) (1979). Doubts raised by the "for purposes of collection" language of that portion of the contract are confirmed by the Amendment to APCC Services Agency Compensation Agreement, which notes that, far from taking on the rights and responsibilities of the PSPs en toto, APCC merely acts as the "PSP's exclusive agent for billing and collection." Amendment at 1 (emphasis added). APCC does nothing more than "tak[e] collective action on behalf of PSP and other[s] * * * with similar claims." *Id.* (emphasis added). APCC's obligations to each PSP in this additional agreement stretch far beyond mere "obligat[ion] to account for the proceeds of a suit brought on the claim." Maj. Op. at 1244.

As noted above, APCC has no actual financial interest in the recovery. The Amendment confirms this. APCC's compensation is determined by a schedule of variable fees determined by current PSP call volume, not the historical PSP call volume at issue in the case before us. APCC Services Agency Compensation Agreement, Schedule A. *See also* Sandusky Memo ("To fund the suits, all plaintiffs are being required to agree to a quarterly assessment of their dial around compensation on a per call basis."). True, if APCC's collection efforts require APCC to provide "additional services * * * over and above the services provided pursuant to the Agreement," APCC could deduct costs (again, based on current call volume) from the PSPs' recoveries, Amendment to APCC Services Agency Compensation Agreement at 2. But APCC has not alleged that such deductions are required in the present case, and we therefore have no occasion to determine whether such hypothetical deductions would be sufficient for standing.

The aggregators whose standing I find lacking advance an alternative theory that they have "associational standing."

Associational standing requires three elements: first, the association's members must otherwise have standing to sue in their own right; second, the interest the association seeks to protect must be germane to its purpose; third, neither the claim asserted nor the relief requested must require the individual members to participate in the suit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977). The aggregators assert that they meet each requirement and therefore have associational standing. I disagree.

An aggregator cannot have "associational standing," because an aggregator is not an "association." The assignors of rights to the aggregators do not thereby become members of the aggregators. Indeed, the aggregators have no members at all. "In determining whether an organization that has no members in the traditional sense may nonetheless assert associational standing, the question is whether the organization is the functional equivalent of a traditional membership organization." *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002). The aggregators are no such thing. APCC Services, Inc., Davel Communications Group, Inc., Data Net Systems, L.L.C., Intera Communications Corp., Jaroth, Inc., and NSC Telemanagement Corp. are all for-profit companies with contractual relationships with a number of other companies. One corporation does not become a member of another corporation by reason of entering into contracts with it. The aggregators are in no sense "membership organizations." They are not even "organizations." They are incorporated entities-legal persons-and their clients are no more their "members" than a law firm's clients are the firm's "members."

In sum, I would respond to the District Court's certified question for interlocutory appeal with instructions to dismiss the complaint with respect to the aggregators that do not own PSPs either in whole or in part. I therefore dissent, respectfully, from Part II.A of the opinion of the Court.

GINSBURG, Chief Judge, dissenting with respect to Section II.B.2 and to the judgment.

Because I believe the plaintiffs have a right to pursue their claims for dial-around compensation under 47 U.S.C. § 201(b), I would affirm the order of the district court on that ground.

Section 201(b) provides in relevant part:

> All charges, practices, classifications, and regulations for and in connection with [a] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful * * *. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

Sections 206 and 207 afford a private right of action based upon conduct made unlawful by chapter 5 of the Act. Section 201(b), which is in chapter 5, makes unlawful any "unjust or unreasonable" practice in connection with a communication service. It is undisputed that both IXCs and PSPs provide a "communication service," and that the Commission is charged with prescribing rules and regulations interpreting what is just and reasonable. *See* 47 U.S.C. § 201(b); *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378-79, 397, 119 S. Ct. 721, 142 L.Ed.2d 835 (1999). I agree with the plaintiffs that the IXCs' failure to pay dial-around compensation constitutes an "unjust and unreasonable practice" as the agency has interpreted that phrase.

In rejecting the plaintiffs' argument on that score, the court frames the question not as whether there is a private right of action under § 201(b), in conjunction with §§ 206 and 207, but where such an action is to be heard--in district court or before the Commission. According to the court, there is no indication

"the Commission in 1999 * * * even thought about suits directly in district court" to recover for a violation of the regulation, op. at 1247, and had the Commission made its intention known, "that would be another matter." *Id.* at 1247 - 1248. I disagree. It is not for the Commission to decide whether the plaintiffs may sue in federal court for a violation of the statute; the Congress has already made that determination. Section 207 provides that "any person claiming to be damaged by a common carrier['s]" violation of Chapter 5 "may either make complaint to the Commission * * * or may bring suit * * * in any district court of the United States of competent jurisdiction."

The PSPs allege the IXCs have violated § 201(b) by failing to pay the sums required by the dial-around compensation regulation. In promulgating that regulation the Commission invoked, in addition to § 276(b)(1)(A), its authority under §§ 201-205, *see In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 F.C.C.R. 2545 ¶ 232, 1999 WL 49817 (1999). In its 2003 Report and Order on the regulation, the agency made express what had previously been implied, namely, that "failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act." *Pay Telephone Reclassification and Compensation Provisions, Report & Order*, 18 F.C.C.R. 19975 ¶ 32, 2003 WL 22283556 (2003). That is clearly an authoritative interpretation of § 201(b). The court can say "[t]here was no authoritative interpretation of § 201(b) in this case" only because it makes no mention of the 2003 Report and Order and fails to note that the Commission filed an amicus brief in this case advancing the same position. I disagree that the Commission has not exercised its interpretive authority in this case; the question, as I see it, I whether its interpretation is correct.

The IXCs and the court claim that, if § 201(b) applies here, then a common carrier's violation of any regulation of the Commission could be said to constitute an unjust and unreasonable practice. I see no need to go so far, however, in order to uphold the agency's interpretation of § 201(b) with respect to this regulation. Indeed, I would simply reiterate what this court said a decade ago, namely, that when the Commission reasonably deems the failure of a common carrier to act in a specified way to be an unjust and unreasonable practice, a carrier that fails to comply with the Commission's prescription violates the Act. *See MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1414 (1995) ("We have repeatedly held that a rate-of-return prescription has the force of law and that the Commission may therefore treat a violation of the prescription as a per se violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates"). Contrary to the suggestion of the IXCs, *Sandoval* does not instruct otherwise. As the Court there explained, it is "meaningless to talk about a separate cause of action to enforce" a regulation that authoritatively construes a statute. 532 U.S. at 284, 121 S. Ct. 1511. "A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Id.*

I find the IXCs' other arguments for rejecting the Commission's interpretation of § 201(b) equally unpersuasive. The IXCs maintain that § 201(b) does not apply here because it "relates [only] to the common carriers' provision of communication services to their customers," but they do not even purport to ground that limitation in the text. Nor is there any precedent supporting such a limitation. On the contrary, both the Commission and this court have previously applied § 201(b) to one carrier's provision of a communication service to another carrier. *See MCI*, 59 F.3d at 1414 (§ 201(b) makes unlawful carrier's violation of agency regulation setting maximum rate-of-return for interstate access); *Ascom*

Communications, Inc. v. Sprint Communications Co., 15 F.C.C.R. 3223, 2000 WL 135252 (2000) (§ 201(b) makes unlawful carrier's attempt to collect from PSP for unauthorized and fraudulent calls placed from PSP's phones over carrier's network).

Sprint and AT & T next argue that § 201(b) applies only to the violation of a regulation, like the one at issue in MCI, promulgated exclusively pursuant to § 205 of the Act, which authorizes the Commission to set just and reasonable rates for services. I disagree – as does the Commission, which has invoked § 201(b) in several contexts to which § 205 does not pertain. *See, e.g., Ascom*, 15 F.C.C.R. at 3227 ("we conclude that Sprint violated section 201(b) when it charged Ascom for certain calls for which Ascom was not a customer"); *In re Telephone Number Portability*, 18 F.C.C.R. 23697 n. 76, 2003 WL 22658207 (2003) ("we note that a violation of our number portability rules would constitute an unjust and unreasonable practice under § 201(b) of the Act"); *Core Communications, Inc. v. SBC Communications Inc.*, 18 F.C.C.R. 7568 ¶ 25, 2003 WL 1884294 (2003) (failure to comply with merger conditions held an unjust an unreasonable practice). The IXCs offer no reason to believe the Commission may determine what constitutes an unjust or unreasonable practice only if, in doing so, it relies exclusively upon its authority under § 205. That limitation cannot be found in either § 201(b) or in § 205.

Having rejected each of the arguments raised by the IXCs, I see no reason to deem unreasonable the Commission's determination that it is an unjust and unreasonable practice for a common carrier to fail to pay PSPs as required by the regulation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). The Congress delegated to the Commission the responsibility of prescribing "such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act, 47 U.S.C. § 201(b), and then specifically directed the

Commission to establish a compensation plan that "fairly compensates" PSPs for dial-around calls. 47 U.S.C. § 276(b)(1)(A). The agency in turn set a rate for dial-around compensation that it believed to be "fair to both payphone owners and the beneficiaries of those calls" and to serve the public interest by ensuring "the widespread deployment of payphones." 14 F.C.C.R. 2545 ¶ 59. This court upheld the Commission's reasoning, so the justness and reasonableness of the rates is no longer open to challenge. *See APCC v. FCC*, 215 F.3d at 52. One would therefore be hard-pressed to say the Commission acted unreasonably when it deemed a common carrier's failure to pay just and reasonable compensation an unjust and unreasonable practice. *See Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir.1994) ("Congress entrusted the administration of the Communications Act to the FCC * * *. Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them").

Accordingly, I would hold the plaintiffs may sue the defendant IXCs under § 201(b) for failure to comply with the Commission's regulation governing dial-around compensation, and would affirm the district court's order on that basis.

APPENDIX B

United States District Court
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A. 010642 ESH.
v.	*	Dec. 17, 2003
SPRINT COMM'N CO. L.P.	*	
Defendant.	*	

MEMORANDUM OPINION

HUVELLE, District Judge.

Plaintiffs in this case, as well as in several others before the Court, seek payment from common carriers of "dial-around compensation" on behalf of payphone service providers ("PSPs") for certain long distance phone calls originating from their payphones.[1] They claim that the carriers have violated section 276(b)(1)(A) of the Communications Act of 1934, as

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[1] Pending before this Court are four additional cases that raise nearly identical issues: *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99-0696 (D.D.C.); *CFL v. AT & T Corp.*, Civ. No. 01-1531 (D.D.C.); *APCC Servs., Inc. v. WorldCom*, Civ. No. 01-0638 (D.D.C.) (stayed pending bankruptcy); and *APCC Servs., Inc. v. Cable and Wireless, Inc.*, Civ. No. 02-0158 (D.D.C.) (stayed pursuant to Cable & Wireless's suggestion of bankruptcy filed on December 10, 2003).

amended, 47 U.S.C. § 276, and its implementing regulations, codified at 47 C.F.R. § 64.1300. Plaintiffs base their claims on sections 206 and 207 that provide for the recovery of damages for violations of the Act.

All of the cases before this Court present an initial question as to whether section 276 and its implementing regulations confer a private right of action to sue for a common carrier's alleged failure to pay adequate dial-around compensation. On September 4, 2003, the Court, upon motion to dismiss by Cable & Wireless, found that plaintiffs have a right of action and can base their claims on section 276. *APCC Servs., Inc. v. Cable & Wireless, Inc.*, 281 F.Supp.2d 52 (D.D.C. 2003) ("*C & W*"). Consistent with that ruling, the Court also allowed plaintiffs to amend their complaint to add additional grounds under sections 201(b), 416(c) and 407 of the Communications Act.[2] *Id.* at 57-59. Sprint has requested that the Court reconsider its rulings and dismiss the amended complaint, or alternatively, certify the question for interlocutory appeal, basing its motion in large part upon the Ninth Circuit's recent holding in *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir.2003).[3]

Four of these actions also present a question as to whether plaintiffs have Article III standing as assignees of the claims of

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[2] Applying its ruling in *C & W*, the Court also denied Sprint's motion to dismiss, and granted plaintiff's motion to amend in *APCC Services, Inc. v. Sprint Communications Co.*, Civ. No. 02-0642 (D.D.C.) (Order issued September 3, 2002).

[3] Raising many of the same arguments against plaintiffs' right to sue that Sprint presents, C & W, prior to filing for bankruptcy, also filed a motion for reconsideration, or in the alternative, for certification of an interlocutory appeal, arguing that there is no private right of action under the Act. Curiously, AT & T, as defendant in two of the cases before the Court, has never challenged the proposition that plaintiffs may sue under the Communications Act for the alleged failure to pay dial-around compensation.

numerous PSPs.[4] The Court initially dismissed one of these cases on March 28, 2003, finding that plaintiffs lacked standing (*see APCC Servs., Inc. v. AT & T Corp.*, 254 F.Supp.2d 135 (D.D.C. 2003) ("*AT & T I*")), but upon reconsideration, it concluded that the assignments executed by the PSPs bestowed upon the aggregator-plaintiffs standing sufficient to survive an Article III challenge. *See APCC Servs., Inc. v. AT & T Corp.*, 281 F.Supp.2d 41 (D.D.C. 2003) ("*AT & T II*"). AT & T has moved for reconsideration of the Court's second decision on the standing issue, or in the alternative, for certification of an interlocutory appeal.[5]

Whether the Act confers a private right of action to collect dial-around compensation from carriers is a controlling question of law, for it is dispositive as to all cases before the Court.[6] To the extent that a private right of action is found to exist, the issue of whether the assignees have standing to sue is also controlling, and is dispositive as to three of the five pending actions.[7] An immediate appeal to the Circuit Court of these

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[4] This issue is not presented by *CFL v. AT & T Corp.*, Civ. No. 01- 1531 (D.D.C.).

[5] Prior to filing for bankruptcy, C & W also moved for reconsideration of the Court's decision on standing, or in the alternative, for certification of an interlocutory appeal.

[6] Each of the cases is based upon the rights arguably conferred by § 276 and its implementing regulations. One plaintiff (Peoples Telephone Company) in *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99- 0696, has brought a breach of contract claim as well, but the Court has no diversity jurisdiction over that claim, so without a private right of action under the Communications Act, the Court would have no basis to exercise jurisdiction over the contract claim.

[7] There are a limited number of non-assignee plaintiffs named in *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99-0696 (D.D.C.), and *CFL v. AT & T Corp.*, Civ. No. 01-1531 (D.D.C.), that would be unaffected by a decision that the assignee-plaintiffs lack standing.

issues will prevent potentially unnecessary and protracted litigation while definitively resolving these disputed jurisdictional issues. Thus, although the Court is unwilling to reconsider its prior opinions in *C & W* and *AT & T II*, it will grant the carriers' motions for certification of an interlocutory appeal of both decisions.

Each of the cases is based upon the rights arguably conferred by § 276 and its implementing regulations. One plaintiff (Peoples Telephone Company) in *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99-0696, has brought a breach of contract claim as well, but the Court has no diversity jurisdiction over that claim, so without a private right of action under the Communications Act, the Court would have no basis to exercise jurisdiction over the contract claim.

LEGAL ANALYSIS

Whether to allow an interlocutory appeal of a non-final order is left to the discretion of the district court. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). The court may certify such an appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the ruling exists; and (3) an immediate appeal would materially advance the litigation. *See* 28 U.S.C. § 1292(b); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002 n. 2 (D.C. Cir. 1986); *In re Korean Air Lines Disaster*, 935 F.Supp. 10, 16 (D.D.C. 1996). The party seeking interlocutory review has the burden of persuading the Court that the "circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 33142129, at *1 (D.D.C. 2000) (citing *First Am. Corp. v. Al-Nahyan*, 948 F.Supp. 1107, 1116 (D.D.C. 1996)).

In deciding whether to grant interlocutory appeal, the Court of Appeals in this Circuit follows the collateral order doctrine, *see Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1026 (D.C. Cir. 1997), which allows for appeal if it "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) would be effectively unreviewable on appeal from a final judgment." *United States v. Rostenkowski*, 59 F.3d 1291, 1296 (D.C. Cir. 1995) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)).

I. Controlling Question of Law

Under § 1292(b), a "controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 233 F.Supp.2d 16, 19 (D.D.C. 2002). Controlling questions of law include issues that would terminate an action if the district court's order were reversed. *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) (a question of law is controlling if it involves issues of personal or subject matter jurisdiction); *United States ex rel. Wis. v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984) (decision finding subject matter jurisdiction involves a controlling question of law); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974) (a question is "controlling" if error in its resolution would warrant dismissal).

The resolution of an issue need not necessarily terminate an action in order to be "controlling," *Klinghoffer*, 921 F.2d at 24, but instead may involve a procedural determination that may significantly impact the action. *See In re The Duplan Corp.*, 591 F.2d 139, 148 n. 11 (2d Cir.1978) (a "controlling question of law" includes procedural determination affecting the conduct of an action); *Judicial Watch*, 233 F.Supp.2d at 19 (citing

Johnson v. Burken, 930 F.2d 1202, 1206 (7th Cir. 1991) (a question of law can be controlling if it determines the outcome "or even the future course of the litigation")); *see also* 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, § 3930 at 426 (1996) ("A steadily growing number of decisions * * * have accepted the better view that a question is controlling * * * if interlocutory reversal might save time for the district court, and time and expense for the litigants."). The impact that the appeal will have on other cases is also a factor supporting a conclusion that the question is controlling. *See Klinghoffer*, 921 F.2d at 24 (citing *Brown v. Bullock*, 294 F.2d 415, 417 (2d Cir.1961) (leave to appeal granted in part because the "determination was likely to have precedential value for a large number of other suits")); *Genentech, Inc. v. Novo Nordisk A/S*, 907 F.Supp. 97, 99 (S.D.N.Y. 1995) (a question is "controlling" if it affects a large number of cases).

Whether the Communications Act provides a private right of action to collect dial-around compensation is a controlling and dispositive question in each of the five cases, as reversal of the Court's finding would definitively terminate these actions. *See Masri v. Wakefield*, 602 F.Supp. 404, 406 (D. Colo.1983) (certifying question as to statutory private right of action). Similarly, if a private right of action is found to exist, the second jurisdictional issue of whether the assignee-plaintiffs have standing is also a controlling question of law. *See Klapper v. Commonwealth Realty Trust*, 662 F.Supp. 235, 236 (D. Del. 1987).[8] Although claims by individual PSPs, which are limited

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[8] Plaintiffs incorrectly argue that because a determination of standing presents a mixed question of law and fact, certification would not be appropriate under section 1292(b). (*See* Pls.' Opp. to AT & T's Mot. at 21.) There is no dispute regarding the contents of the assignments at issue here, and thus, there is no factual dispute that would convert the legal question of standing into a mixed question of law and fact. Rather, the problem is how the jurisprudence involving Article III standing should be applied to the undisputed facts.

in number, may survive the assignees' dismissal for lack of standing, assignee standing is a procedural determination that will significantly impact the form and conduct of these actions. Moreover, because the Court should not speak to any matter over which it lacks jurisdiction, the issue is controlling. *See In re Sealed Case*, 131 F.3d 208, 210 (D.C. Cir. 1997) ("If we are without subject-matter jurisdiction over the case ostensibly before us, then any pronouncement on any issue * * * becomes a violation of our Article III limitations.").

It is also significant that in addition to the five cases here, PSPs and aggregators have filed numerous suits throughout the country against common carriers based on a claim of a private right of action under the Communications Act, as well as an assertion of standing based on assignments executed by the PSPs.[9] Despite the rash of these cases countrywide, the parties in the cases in this jurisdiction are the major players in almost all the litigation countrywide, and the assignee-plaintiffs represent more than 400,000 of the 500,000 to 600,000 payphone lines in the United States. Moreover, the FCC, a frequent party before the D.C. Circuit, has dealt with cases

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[9] The Court discussed many of these cases in its Memorandum Opinion issued in *APCC Servs., Inc. v. WorldCom, Inc.*, Civ. No. 01-638, 2001 U.S. Dist. LEXIS 23988, *18-22, 2001 WL 34383565 (D.D.C. Dec. 21, 2001). For instance, suits have been filed in federal courts in Utah (*Flying J, Inc. v. Sprint Communications Co.*, Civ. No. 99-111-ST (D. Utah)), Virginia (*APCC v. VoCall Communications, Corp.* (E.D. Va.)), Pennsylvania (*see Phone-Tel Communications, Inc. v. AT & T Corp.*, 100 F. Supp 2d 313, 322 (E.D. Pa. 2000)), Arizona (*GCB Communications, Inc. v. WorldCom, Inc.*, Civ. No. 00-1216 (D.Ariz.)), Texas (*see Phonetel Techs., Inc. v. Network Enhanced Telecomm.*, 197 F.Supp.2d 720 (E.D. Tex. 2002)), California (*see, e.g., In re Qwest Communications Corp. Payphone Servs. Providers Compensation Litig.*, No. 02-ML-1483 (C.D. Cal.) (TJH) and cases collected in *C & W*, 281 F.Supp.2d at 54). Although some of these actions have been settled or dismissed, definitive resolution of the issues before the Court could have an impact on those cases that are still pending.

similar to these[10] and has litigated issues relevant to this matter before the D.C. Circuit.[11] Therefore, it too would presumably have a significant interest in the resolution of these jurisdictional issues. The industry as a whole would thus benefit from a ruling from the Court of Appeals, for not only will the resolution of these issues be dispositive of the cases before this Court, but it will provide persuasive authority for courts in other jurisdictions, as well as for the FCC.

II. Substantial Ground for Difference of Opinion

A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits. *See City Stores Co. v. Lerner Shops*, 410 F.2d 1010, 1011 (D.C. Cir. 1969); *see also In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 212 F.Supp.2d 903, 909-10 (S.D. Ind. 2002) (certification is appropriate where other courts have adopted conflicting positions regarding the issue of law proposed for certification). A substantial ground for dispute also exists where a court's challenged decision conflicts with decisions of several

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[10] *See, e.g., Bell Atlantic-Delaware, Inc. v. MCI Telecomms. Corp.*, 17 F.C.C.R. 15, 918, 15, 919 (¶ 3) (2002); *Flying J. Inc. and TON Services, Inc.*, Petition for Expedited Declaratory Ruling Regarding a Primary Jurisdiction Referral from the United States District Court for the District of Utah, Northern Division, Memorandum Opinion and Order, CCB/CPD No. 00-04, FCC 03-108 (May 9, 2003); *In the Matter of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, 2003 FCC LEXIS 5370 (Oct. 3, 2003). In fact, APCC currently has a dial-around compensation claim pending before the FCC. *See APCC v. Verizon Communications, Inc.*, FCC File No. EB-02-MDIC-0082.

[11] *See, e.g., Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003); *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001); *Global Crossing Telecomm., Inc. v. FCC*, 259 F.3d 740 (D.C. Cir. 2001); *APCC v. FCC*, 215 F.3d 51 (D.C. Cir. 2000); *MCI Telecomm. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); and *MCI Telecomm. Corp v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995).

other courts. *See Pub. Interest Research Group v. Hercules, Inc.*, 830 F.Supp. 1549, 1556 (D.N.J. 1993).

"The mere fact that a substantially greater number of judges have resolved the issue one way rather than another does not, of itself, tend to show that there is no ground for difference of opinion." *Vitamins*, 2000 WL 33142129, at *2 (citing *Daetwyler Corp. v. Meyer*, 575 F.Supp. 280, 283 (E.D. Pa. 1983)). Instead, a court faced with a motion for certification must analyze the strength of the arguments in opposition to the challenged ruling to decide whether the issue is truly one on which there is a substantial ground for dispute. *Id.* Where "proceedings that threaten to endure for several years depend on an initial question of jurisdiction * * * or the like," certification may be justified even if there is a relatively low level of uncertainty. 16 Wright & Miller, Federal Practice & Procedure, § 3930 at 422 (1996); *see also Atl. City Elec. Co. v. Gen. Elec. Co.*, 207 F.Supp. 613, 620 (S.D.N.Y. 1962) (when there are reasons to conclusively and expeditiously determine an issue, a narrow approach is unjustified in determining whether there is a substantial ground for difference of opinion).

Although this Court believes that its prior decisions relating to the existence of a private right of action under the Communications Act and the standing of the plaintiffs-assignees are correct,[12] it also recognizes the arguments in support of contrary conclusions are not insubstantial. With respect to the private right of action, the Ninth Circuit in *Greene* found that since § 276 does not establish a right to compensation from

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[12] In this regard, it is noteworthy that after *Greene*, the FCC issued an Order that recognized that "[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act." *In the Matter of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, 2003 FCC LEXIS 5370, ¶ 32 (Oct. 3, 2003).

common carriers, the complaint must be dismissed. 340 F.3d at 1052.[13] In so holding, the Ninth Circuit found that there was no basis for finding either an explicit or implied private right of action under sections 206, 207 or 276. In rendering its decision, the Court relied on the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), as did this Court (*see* 281 F.Supp.2d at 55), but its more restrictive analysis of Sandoval led it to find no private right of action. Moreover, its ruling explicitly rejected the reasoning of the one case upon which this Court relied (*see C & W*, 281 F.Supp.2d at 56) – *Precision Pay Phones v. Qwest Communications Corp.*, 210 F.Supp.2d 1106, 1115 (N.D. Cal.2002) – on the grounds that the California district court had incorrectly found a statutory right to fair compensation. *See Greene*, 340 F.3d at 1051 n. 4. Given the absence of any authority in this jurisdiction regarding this issue,[14] and an unanimous decision from an appellate court in another circuit on the same issue, a finding of a substantial difference of opinion as to whether the Communications Act provides for a private right of action is warranted.[15]

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[13] While *Greene* was issued a week before this Court's decision in *C & W*, this Court was unaware of the *Greene* decision as the parties here, who were also involved in *Greene*, failed to bring it to the Court's attention.

[14] As this Court noted in *C & W*, this Circuit's decision in MCI, while relevant and instructive, does not resolve the issue here, since MCI involved a challenge to an FCC order, not a suit between private parties. *C & W*, 281 F.Supp.2d at 55.

[15] Arguably, the Ninth Circuit's analysis in *Greene* also provides persuasive authority to deny plaintiffs' request to amend their complaints to add claims under §§ 201(b), 407 and 416(c). As this Court noted, these claims "appear not to add anything to plaintiffs' case beyond what is already covered by the claims expressly based on section 276" (*C & W*, 281 F.Supp.2d at 58), and thus, Sprint may be correct in arguing that these additional counts constitute nothing more than an attempt to recast plaintiffs' § 276 claim under other provisions of the Act. (Sprint's Mot. at 14.) Moreover, these proposed amendments would contravene *Greene*'s observation that:

Similarly, with respect to the issue of Article III standing, there is substantial ground for difference of opinion as reflected by this Court's conflicting rulings in *AT & T I* and *AT & T II*, a recent decision by the Central District of California that found, without opinion, that plaintiffs lacked standing (*In re Qwest Communications Corp. Payphone Servs. Providers Compensation Litig*, No. 02-ML-1483 (TJH) (C.D. Cal. August 15, 2003)), and the lack of any case law squarely on point.[16] To the extent that there is a private right of action under the Act, the issue of standing based on an assignment of rights presents a novel issue of whether the assignees can satisfy Article III's requirement of injury-in-fact. (*See* AT & T Mot. at 8) (citing *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (the injury must affect the plaintiff in a personal and individual way).) Defendants also argue, with some persuasiveness, that this Court's ruling would allow parties to evade the requirements for class action certification set forth in Fed.R.Civ.P. 23 and for associational standing established in *Hunt v. Washington State Apple Advertising Commission*, 432

> a private right of action runs counter to this centralization of function [in the FCC] and to the development of a coherent national communications policy. It would also put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal judges, instead of in the hands of the Commission * * *. The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy.

340 F.3d at 1053 (internal quotations and citations omitted).

[16] Even the Supreme Court has acknowledged that its rulings on standing have been less than clear. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) ("We need not mince words when we say that the concept of 'Article III standing' has not been defined with complete consistency in all the various cases decided by this Court which have discussed it * * *.").

U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). (*See* AT & T's Mot. at 14- 15.)

Given these arguments, as well as the lack of any binding precedent, the Court must agree that, to the extent that a private right of action is found to exist, certification of the issue of standing is also warranted.

III. Material Advancement of the Disposition of the Litigation

Plaintiffs filed the first of these cases against AT & T in early 1999. On May 18, 2001, the Court appointed a special master to assist in overseeing the complicated discovery issues that were presented by that case. To date, the docket in the AT & T case contains more than 110 entries, representing a course of protracted litigation that is currently bogged down in discovery and will no doubt consume a significant amount of the parties' resources in the months and years to come. While the four related matters were not filed until 2001 and 2002, they too will undoubtedly present similarly daunting discovery issues.

For instance, as argued by AT & T, the cost of discovery related to the telephone calls alone will exceed any possible damages award, because "there are likely over one billion separate calls to argue about here."[17] (AT & T's Mot. at 15.) In fact, the parties have already expended a substantial amount of resources attempting to design acceptable protocols to analyze

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[17] AT & T represents that in each case in which the aggregators are named as plaintiffs, each of the 1400 PSPs must demonstrate "that each call for which compensation is sought: (a) was made from their phone; (b) at a time when the local exchange carrier had Flex ANI available [and] operational on that particular line and that [the carrier defendant] received the signal; (c) was carried by [defendant]; (d) was answered by the recipient; and (e) was not paid for by [the carrier]." (AT & T's Mot. at 15.)

a selected 2000 phone calls and have spent more than $1 million relating to document discovery. (*See* AT & T's Mot. at 19; AT & T's Reply at 11 n. 5.) And, although significant efforts have been made to gather discovery, AT & T claims that because of the sheer volume of information involved, neither plaintiffs nor the carriers have any rational basis upon which to evaluate possible settlement--more than four years after the filing of the suit. (*See* AT & T's Mot. at 16.)

An immediate appeal would conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court's rulings are reversed. *See Lemery v. Ford Motor Co.*, 244 F.Supp.2d 720, 728 (S.D. Tex. 2002) ("It would pain the Court to see both attorneys * * * [and parties] proceed to judgment after considerable expense and delay, only to discover that the judgment must be overturned on appeal because the federal judiciary lacks subject matter jurisdiction."). Resolution of this question would also assist many other courts in resolving similar disputes. *See Vitamins*, 2000 WL 33142129, at *2. Moreover, although plaintiffs argue correctly that they will be prejudiced by further delays, in the event that it is ultimately found that this Court lacks jurisdiction to litigate these cases, it would be far better for all concerned, including plaintiffs, to have these matters resolved now, as opposed to sometime in the distant future.

Finally, the Court is confident that appellate review of the jurisdictional issues presented satisfies the collateral order doctrine, as it would conclusively resolve important legal issues that are completely separate from the merits of the actions, and these issues will, as a practical matter, be effectively unreviewable following trial because of the enormous expense and time involved.[18] *See GTE New Media Servs. Inc. v.*

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[18] Plaintiffs claim there is a "long line of unambiguous precedent" establishing that the issue of standing is not effectively unreviewable on

Ameritech Corp., 44 F.Supp.2d 313, 316 (D.D.C.1999) ("All indications thus far indicate that to reach final judgment the parties will probably undergo voluminous and burdensome discovery and possibly months of trial. To learn after that point, on appeal, that the parties should not have proceeded so far, and at such expense, would make the issue effectively unreviewable on appeal from final judgment.")

CONCLUSION

Interlocutory review is warranted here because the interest in avoiding excessively burdensome and expensive litigation is "significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule." *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003). Although the Court recognizes that the collateral order doctrine should be sparingly invoked, these cases more than qualify for certification under 28 U.S.C. § 1292(b). Moreover, given the need for certification, the Court will grant defendants' request to stay discovery pending appeal, but it expects the parties to seek expedited review in the Court of Appeals.

The Court therefore grants the defendants' request for certification and a stay of discovery pending resolution of the appeal. A separate Order accompanies this Memorandum Opinion.

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appeal from a final judgment, and thus fails to satisfy the collateral order doctrine. (Pls.' Opp. to AT & T's Mot. at 25.) This authority, however, establishes only that a party may not, as of right, take immediate interlocutory appeal on the standing issue absent a Rule 54(b) certification from the district court, and thus, is not relevant here. *See Carringer v. Tessmer*, 253 F.3d 1322, 1323 (11th Cir.2001).

ORDER

This matter is before the Court on defendant Sprint's Motion to Dismiss Plaintiffs' Second Amended Complaint [ ], or in the alternative, to certify an interlocutory appeal. Based on the pleadings, the record, and relevant case law, and for the reasons discussed in the Court's accompanying Memorandum Opinion, it is hereby

ORDERED that defendant's motion to dismiss is **DENIED**; it is

FURTHER ORDERED that defendant's motion for certification of interlocutory appeal is **GRANTED**; and it is

FURTHER ORDERED that *APCC Servs., Inc. v. Cable & Wireless, Inc.*, 281 F.Supp.2d 52 (D.D.C. 2003) and *APCC Servs., Inc. v. AT & T Corp.*, 281 F.Supp.2d 41 (D.D.C. 2003) are certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) as they involve controlling questions of law as to which there is a substantial ground for difference of opinion, and an immediate appeal therefrom may materially advance the ultimate termination of this litigation; and it is

FURTHER ORDERED that discovery in the case is stayed pending action by the Court of Appeals.

SO ORDERED.

APPENDIX C

United States District Court
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A. 99-0696 ESH.
v.	*	Dec. 17, 2003
AT& T CORPORATION,	*	
Defendant.	*	

MEMORANDUM OPINION

HUVELLE, District Judge.

Plaintiffs in this case, as well as in several others before the Court, seek payment from common carriers of "dial-around compensation" on behalf of payphone service providers ("PSPs") for certain long distance phone calls originating from their payphones.[1] They claim that the carriers have violated section 276(b)(1)(A) of the Communications Act of 1934, as

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[1] Pending before this Court are four additional cases that raise nearly identical issues: *APCC Servs., Inc. v. Sprint Communications Co.*, Civ. No. 01-0642 (D.D.C.); *CFL v. AT & T Corp.*, Civ. No. 01-1531 (D.D.C.); *APCC Servs., Inc. v. WorldCom*, Civ. No. 01-0638 (D.D.C.) (stayed pending bankruptcy); and *APCC Servs., Inc. v. Cable and Wireless, Inc.*, Civ. No. 02-0158 (D.D.C.) (stayed pursuant to Cable & Wireless's suggestion of bankruptcy filed on December 10, 2003).

amended, 47 U.S.C. § 276, and its implementing regulations, codified at 47 C.F.R. § 64.1300. Plaintiffs base their claims on sections 206 and 207 that provide for the recovery of damages for violations of the Act.

All of the cases before this Court present an initial question as to whether section 276 and its implementing regulations confer a private right of action to sue for a common carrier's alleged failure to pay adequate dial-around compensation. On September 4, 2003, the Court, upon motion to dismiss by Cable & Wireless, found that plaintiffs have a right of action and can base their claims on section 276. *APCC Servs., Inc. v. Cable & Wireless, Inc.*, 281 F.Supp.2d 52 (D.D.C.2003) ("*C & W*"). Consistent with that ruling, the Court also allowed plaintiffs to amend their complaint to add additional grounds under sections 201(b), 416(c) and 407 of the Communications Act.[2] *Id.* at 57-59. Sprint has requested that the Court reconsider its rulings and dismiss the amended complaint, or alternatively, certify the question for interlocutory appeal, basing its motion in large part upon the Ninth Circuit's recent holding in *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir.2003).[3]

Four of these actions also present a question as to whether plaintiffs have Article III standing as assignees of the claims of

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[2] Applying its ruling in *C & W*, the Court also denied Sprint's motion to dismiss, and granted plaintiff's motion to amend in *APCC Services, Inc. v. Sprint Communications Co.*, Civ. No. 02-0642 (D.D.C.) (Order issued September 3, 2002).

[3] Raising many of the same arguments against plaintiffs' right to sue that Sprint presents, C & W, prior to filing for bankruptcy, also filed a motion for reconsideration, or in the alternative, for certification of an interlocutory appeal, arguing that there is no private right of action under the Act. Curiously, AT & T, as defendant in two of the cases before the Court, has never challenged the proposition that plaintiffs may sue under the Communications Act for the alleged failure to pay dial-around compensation.

numerous PSPs.[4] The Court initially dismissed one of these cases on March 28, 2003, finding that plaintiffs lacked standing (*see APCC Servs., Inc. v. AT & T Corp.*, 254 F.Supp.2d 135 (D.D.C.2003) ("*AT & T I*")) but upon reconsideration, it concluded that the assignments executed by the PSPs bestowed upon the aggregator-plaintiffs standing sufficient to survive an Article III challenge. *See APCC Servs., Inc. v. AT & T Corp.*, 281 F.Supp.2d 41 (D.D.C.2003) ("*AT & T II*"). AT & T has moved for reconsideration of the Court's second decision on the standing issue, or in the alternative, for certification of an interlocutory appeal.[5]

Whether the Act confers a private right of action to collect dial-around compensation from carriers is a controlling question of law, for it is dispositive as to all cases before the Court.[6] To the extent that a private right of action is found to exist, the issue of whether the assignees have standing to sue is also controlling, and is dispositive as to three of the five pending actions.[7] An immediate appeal to the Circuit Court of these

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[4] This issue is not presented by *CFL v. AT & T Corp.*, Civ. No. 01- 1531 (D.D.C.).

[5] Prior to filing for bankruptcy, C & W also moved for reconsideration of the Court's decision on standing, or in the alternative, for certification of an interlocutory appeal.

[6] Each of the cases is based upon the rights arguably conferred by § 276 and its implementing regulations. One plaintiff (Peoples Telephone Company) in *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99- 0696, has brought a breach of contract claim as well, but the Court has no diversity jurisdiction over that claim, so without a private right of action under the Communications Act, the Court would have no basis to exercise jurisdiction over the contract claim.

[7] There are a limited number of non-assignee plaintiffs named in *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99-0696 (D.D.C.), and *CFL v. AT & T Corp.*, Civ. No. 01-1531 (D.D.C.), that would be unaffected by a decision that the assignee-plaintiffs lack standing.

issues will prevent potentially unnecessary and protracted litigation while definitively resolving these disputed jurisdictional issues. Thus, although the Court is unwilling to reconsider its prior opinions in *C & W* and *AT & T II*, it will grant the carriers' motions for certification of an interlocutory appeal of both decisions.

LEGAL ANALYSIS

Whether to allow an interlocutory appeal of a non-final order is left to the discretion of the district court. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). The court may certify such an appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the ruling exists; and (3) an immediate appeal would materially advance the litigation. *See* 28 U.S.C. § 1292(b); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002 n. 2 (D.C. Cir.1986); *In re Korean Air Lines Disaster*, 935 F.Supp. 10, 16 (D.D.C.1996). The party seeking interlocutory review has the burden of persuading the Court that the "circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 33142129, at *1 (D.D.C. 2000) (citing *First Am. Corp. v. Al-Nahyan*, 948 F.Supp. 1107, 1116 (D.D.C. 1996)).

In deciding whether to grant interlocutory appeal, the Court of Appeals in this Circuit follows the collateral order doctrine, *see Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1026 (D.C. Cir. 1997), which allows for appeal if it "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) would be effectively unreviewable on appeal from a final judgment." *United States v. Rostenkowski*, 59 F.3d 1291, 1296 (D.C. Cir. 1995) (quoting *Coopers & Lybrand v.*

Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)).

I. Controlling Question of Law

Under § 1292(b), a "controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 233 F. Supp.2d 16, 19 (D.D.C. 2002). Controlling questions of law include issues that would terminate an action if the district court's order were reversed. *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir.1990) (a question of law is controlling if it involves issues of personal or subject matter jurisdiction); *United States ex rel. Wis. v. Dean*, 729 F.2d 1100, 1103 (7th Cir.1984) (decision finding subject matter jurisdiction involves a controlling question of law); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.1974) (a question is "controlling" if error in its resolution would warrant dismissal).

The resolution of an issue need not necessarily terminate an action in order to be "controlling," *Klinghoffer*, 921 F.2d at 24, but instead may involve a procedural determination that may significantly impact the action. *See In re The Duplan Corp.*, 591 F.2d 139, 148 n. 11 (2d Cir.1978) (a "controlling question of law" includes procedural determination affecting the conduct of an action); *Judicial Watch*, 233 F.Supp.2d at 19 (citing *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir.1991) (a question of law can be controlling if it determines the outcome "or even the future course of the litigation")); *see also* 16 Wright, Miller & Cooper, Federal Practice & Procedure, § 3930 at 426 (1996) ("A steadily growing number of decisions * * * have accepted the better view that a question is controlling * * * if interlocutory reversal might save time for the district court, and time and expense for the litigants."). The impact that the appeal will have on other cases is also a factor supporting a

conclusion that the question is controlling. *See Klinghoffer*, 921 F.2d at 24 (citing *Brown v. Bullock*, 294 F.2d 415, 417 (2d Cir.1961) (leave to appeal granted in part because the "determination was likely to have precedential value for a large number of other suits")); *Genentech, Inc. v. Novo Nordisk A/S*, 907 F.Supp. 97, 99 (S.D.N.Y.1995) (a question is "controlling" if it affects a large number of cases).

Whether the Communications Act provides a private right of action to collect dial-around compensation is a controlling and dispositive question in each of the five cases, as reversal of the Court's finding would definitively terminate these actions. *See Masri v. Wakefield*, 602 F.Supp. 404, 406 (D.Colo.1983) (certifying question as to statutory private right of action). Similarly, if a private right of action is found to exist, the second jurisdictional issue of whether the assignee-plaintiffs have standing is also a controlling question of law. *See Klapper v. Commonwealth Realty Trust*, 662 F.Supp. 235, 236 (D. Del.1987).[8] Although claims by individual PSPs, which are limited in number, may survive the assignees' dismissal for lack of standing, assignee standing is a procedural determination that will significantly impact the form and conduct of these actions. Moreover, because the Court should not speak to any matter over which it lacks jurisdiction, the issue is controlling. *See In re Sealed Case*, 131 F.3d 208, 210 (D.C. Cir.1997) ("If we are without subject-matter jurisdiction over the case ostensibly before us, then any pronouncement on any issue * * * becomes a violation of our Article III limitations.").

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[8] Plaintiffs incorrectly argue that because a determination of standing presents a mixed question of law and fact, certification would not be appropriate under section 1292(b). (*See* Pls.' Opp. to AT & T's Mot. at 21.) There is no dispute regarding the contents of the assignments at issue here, and thus, there is no factual dispute that would convert the legal question of standing into a mixed question of law and fact. Rather, the problem is how the jurisprudence involving Article III standing should be applied to the undisputed facts.

It is also significant that in addition to the five cases here, PSPs and aggregators have filed numerous suits throughout the country against common carriers based on a claim of a private right of action under the Communications Act, as well as an assertion of standing based on assignments executed by the PSPs.[9] Despite the rash of these cases countrywide, the parties in the cases in this jurisdiction are the major players in almost all the litigation countrywide, and the assignee-plaintiffs represent more than 400,000 of the 500,000 to 600,000 payphone lines in the United States. Moreover, the FCC, a frequent party before the D.C. Circuit, has dealt with cases similar to these[10] and has litigated issues relevant to this matter

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[9] The Court discussed many of these cases in its Memorandum Opinion issued in *APCC Servs., Inc. v. WorldCom, Inc.*, Civ. No. 01-638, 2001 U.S. Dist. LEXIS 23988, *18-22 (D.D.C. Dec. 21, 2001). For instance, suits have been filed in federal courts in Utah (*Flying J, Inc. v. Sprint Communications Co.*, Civ. No. 99-111-ST (D. Utah)), Virginia (*APCC v. VoCall Communications, Corp.* (E.D. Va.)), Pennsylvania (*see Phone-Tel Communications, Inc. v. AT & T Corp.*, 100 F. Supp 2d 313, 322 (E.D. Pa. 2000)), Arizona (*GCB Communications, Inc. v. WorldCom, Inc.*, Civ. No. 00-1216 (D. Ariz.)), Texas (*see Phonetel Techs., Inc. v. Network Enhanced Telecom*, 197 F.Supp.2d 720 (E.D. Tex.2002)), California (*see, e.g., In re Qwest Communications Corp. Payphone Servs. Providers Compensation Litig.*, No. 02-ML-1483 (C.D. Cal.) (TJH) and cases collected in *C & W*, 281 F.Supp.2d at 54). Although some of these actions have been settled or dismissed, definitive resolution of the issues before the Court could have an impact on those cases that are still pending.

[10] *See, e.g., Bell Atlantic-Delaware, Inc. v. MCI Telecomms. Corp.*, 17 F.C.C.R. 15,918, 15,919 (¶3) (2002) WL 1842441 (2002); *Flying J. Inc. and TON Services, Inc.*, Petition for Expedited Declaratory Ruling Regarding a Primary Jurisdiction Referral from the United States District Court for the District of Utah, Northern Division, Memorandum Opinion and Order, CCB/CPD No. 00-04, FCC 03-108, 2003 WL 21057292 (May 9, 2003); *In the Matter of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, 2003 FCC LEXIS 5370, 2003 WL 22283556 (Oct. 3, 2003). In fact, APCC currently has a dial-around compensation claim pending before the FCC. *See APCC v. Verizon Communications, Inc.*, FCC File No. EB-02-MDIC-0082.

before the D.C. Circuit.[11] Therefore, it too would presumably have a significant interest in the resolution of these jurisdictional issues. The industry as a whole would thus benefit from a ruling from the Court of Appeals, for not only will the resolution of these issues be dispositive of the cases before this Court, but it will provide persuasive authority for courts in other jurisdictions, as well as for the FCC.

II. Substantial Ground for Difference of Opinion

A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits. *See City Stores Co. v. Lerner Shops*, 410 F.2d 1010, 1011 (D.C. Cir. 1969); *see also In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 212 F.Supp.2d 903, 909-10 (S.D. Ind. 2002) (certification is appropriate where other courts have adopted conflicting positions regarding the issue of law proposed for certification). A substantial ground for dispute also exists where a court's challenged decision conflicts with decisions of several other courts. *See Pub. Interest Research Group v. Hercules, Inc.*, 830 F.Supp. 1549, 1556 (D.N.J.1993).

"The mere fact that a substantially greater number of judges have resolved the issue one way rather than another does not, of itself, tend to show that there is no ground for difference of opinion." *Vitamins*, 2000 WL 33142129, at *2 (citing *Daetwyler Corp. v. R. Meyer*, 575 F.Supp. 280, 283 (E.D. Pa. 1983)). Instead, a court faced with a motion for certification must analyze the strength of the arguments in opposition to the challenged ruling to decide whether the issue is truly one on

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[11] *See, e.g., Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003); *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001); *Global Crossing Telecomm., Inc. v. FCC*, 259 F.3d 740 (D.C. Cir. 2001); *APCC v. FCC*, 215 F.3d 51 (D.C. Cir. 2000); *MCI Telecomm. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); and *MCI Telecomm. Corp v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995).

which there is a substantial ground for dispute. *Id.* Where "proceedings that threaten to endure for several years depend on an initial question of jurisdiction * * * or the like," certification may be justified even if there is a relatively low level of uncertainty. 16 Wright, Miller & Cooper, Federal Practice & Procedure, § 3930 at 422 (1996); *see also Atl. City Elec. Co. v. Gen. Elec. Co.*, 207 F.Supp. 613, 620 (S.D.N.Y. 1962) (when there are reasons to conclusively and expeditiously determine an issue, a narrow approach is unjustified in determining whether there is a substantial ground for difference of opinion).

Although this Court believes that its prior decisions relating to the existence of a private right of action under the Communications Act and the standing of the plaintiffs-assignees are correct,[12] it also recognizes the arguments in support of contrary conclusions are not insubstantial. With respect to the private right of action, the Ninth Circuit in *Greene* found that since § 276 does not establish a right to compensation from common carriers, the complaint must be dismissed. 340 F.3d at 1052.[13] In so holding, the Ninth Circuit found that there was no basis for finding either an explicit or implied private right of action under sections 206, 207 or 276. In rendering its decision, the Court relied on the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), as did this Court (*see* 281 F.Supp.2d at 55), but its more

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[12] In this regard, it is noteworthy that after *Greene*, the FCC issued an Order that recognized that "[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act." *In the Matter of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, 2003 FCC LEXIS 5370, ¶ 32, 2003 WL 22283556 (Oct. 3, 2003).

[13] While *Greene* was issued a week before this Court's decision in *C & W*, this Court was unaware of the *Greene* decision as the parties here, who were also involved in *Greene*, failed to bring it to the Court's attention.

restrictive analysis of *Sandoval* led it to find no private right of action. Moreover, its ruling explicitly rejected the reasoning of the one case upon which this Court relied (*see C & W*, 281 F.Supp.2d at 56) – *Precision Pay Phones v. Qwest Communications Corp.*, 210 F.Supp.2d 1106, 1115 (N.D. Cal. 2002) – on the grounds that the California district court had incorrectly found a statutory right to fair compensation. *See Greene*, 340 F.3d at 1051 n. 4. Given the absence of any authority in this jurisdiction regarding this issue,[14] and an unanimous decision from an appellate court in another circuit on the same issue, a finding of a substantial difference of opinion as to whether the Communications Act provides for a private right of action is warranted.[15]

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[14] As this Court noted in *C & W*, this Circuit's decision in *MCI*, while relevant and instructive, does not resolve the issue here, since *MCI* involved a challenge to an FCC order, not a suit between private parties. *C & W*, 281 F.Supp.2d at 55.

[15] Arguably, the Ninth Circuit's analysis in *Greene* also provides persuasive authority to deny plaintiffs' request to amend their complaints to add claims under §§ 201(b), 407 and 416(c). As this Court noted, these claims "appear not to add anything to plaintiffs' case beyond what is already covered by the claims expressly based on section 276" (*C & W*, 281 F.Supp.2d at 58), and thus, Sprint may be correct in arguing that these additional counts constitute nothing more than an attempt to recast plaintiffs' § 276 claim under other provisions of the Act. (Sprint's Mot. at 14.) Moreover, these proposed amendments would contravene *Greene*'s observation that:

> a private right of action runs counter to this centralization of function [in the FCC] and to the development of a coherent national communications policy. It would also put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal judges, instead of in the hands of the Commission * * *. The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy.

340 F.3d at 1053 (internal quotations and citations omitted).

Similarly, with respect to the issue of Article III standing, there is substantial ground for difference of opinion as reflected by this Court's conflicting rulings in *AT & T I* and *AT & T II*, a recent decision by the Central District of California that found, without opinion, that plaintiffs lacked standing (*In re Qwest Communications Corp. Payphone Servs. Providers Compensation Litig*, No. 02-ML-1483 (TJH) (C.D. Cal. August 15, 2003)), and the lack of any case law squarely on point.[16] To the extent that there is a private right of action under the Act, the issue of standing based on an assignment of rights presents a novel issue of whether the assignees can satisfy Article III's requirement of injury-in-fact. (*See* AT & T Mot. at 8) (citing *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997)) (the injury must affect the plaintiff in a personal and individual way). Defendants also argue, with some persuasiveness, that this Court's ruling would allow parties to evade the requirements for class action certification set forth in Fed.R.Civ.P. 23 and for associational standing established in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). (*See* AT & T's Mot. at 14- 15.)

Given these arguments, as well as the lack of any binding precedent, the Court must agree that, to the extent that a private right of action is found to exist, certification of the issue of standing is also warranted.

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[16] Even the Supreme Court has acknowledged that its rulings on standing have been less than clear. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) ("We need not mince words when we say that the concept of 'Article III standing' has not been defined with complete consistency in all the various cases decided by this Court which have discussed it * * *.").

III. Material Advancement of the Disposition of the Litigation

Plaintiffs filed the first of these cases against AT & T in early 1999. On May 18, 2001, the Court appointed a special master to assist in overseeing the complicated discovery issues that were presented by that case. To date, the docket in the AT & T case contains more than 110 entries, representing a course of protracted litigation that is currently bogged down in discovery and will no doubt consume a significant amount of the parties' resources in the months and years to come. While the four related matters were not filed until 2001 and 2002, they too will undoubtedly present similarly daunting discovery issues.

For instance, as argued by AT & T, the cost of discovery related to the telephone calls alone will exceed any possible damages award, because "there are likely over one billion separate calls to argue about here."[17] (AT & T's Mot. at 15.) In fact, the parties have already expended a substantial amount of resources attempting to design acceptable protocols to analyze a selected 2000 phone calls and have spent more than $1 million relating to document discovery. (*See* AT & T's Mot. at 19; AT & T's Reply at 11 n. 5.) And, although significant efforts have been made to gather discovery, AT & T claims that because of the sheer volume of information involved, neither plaintiffs nor the carriers have any rational basis upon which to evaluate possible settlement--more than four years after the filing of the suit. (*See* AT & T's Mot. at 16.)

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[17] AT & T represents that in each case in which the aggregators are named as plaintiffs, each of the 1400 PSPs must demonstrate "that each call for which compensation is sought: (a) was made from their phone; (b) at a time when the local exchange carrier had Flex ANI available [and] operational on that particular line and that [the carrier defendant] received the signal; (c) was carried by [defendant]; (d) was answered by the recipient; and (e) was not paid for by [the carrier]." (AT & T's Mot. at 15.)

An immediate appeal would conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court's rulings are reversed. *See Lemery v. Ford Motor Co.*, 244 F.Supp.2d 720, 728 (S.D. Tex. 2002) ("It would pain the Court to see both attorneys * * * [and parties] proceed to judgment after considerable expense and delay, only to discover that the judgment must be overturned on appeal because the federal judiciary lacks subject matter jurisdiction."). Resolution of this question would also assist many other courts in resolving similar disputes. *See Vitamins*, 2000 WL 33142129, at *2. Moreover, although plaintiffs argue correctly that they will be prejudiced by further delays, in the event that it is ultimately found that this Court lacks jurisdiction to litigate these cases, it would be far better for all concerned, including plaintiffs, to have these matters resolved now, as opposed to sometime in the distant future.

Finally, the Court is confident that appellate review of the jurisdictional issues presented satisfies the collateral order doctrine, as it would conclusively resolve important legal issues that are completely separate from the merits of the actions, and these issues will, as a practical matter, be effectively unreviewable following trial because of the enormous expense and time involved.[18] *See GTE New Media Servs. Inc. v. Ameritech Corp.*, 44 F.Supp.2d 313, 316 (D.D.C. 1999) ("All indications thus far indicate that to reach final judgment the parties will probably undergo voluminous and burdensome discovery and possibly months of trial. To learn after that point,

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[18] Plaintiffs claim there is a "long line of unambiguous precedent" establishing that the issue of standing is not effectively unreviewable on appeal from a final judgment, and thus fails to satisfy the collateral order doctrine. (Pls.' Opp. to AT & T's Mot. at 25.) This authority, however, establishes only that a party may not, as of right, take immediate interlocutory appeal on the standing issue absent a Rule 54(b) certification from the district court, and thus, is not relevant here. *See Carringer v. Tessmer*, 253 F.3d 1322, 1323 (11th Cir. 2001).

on appeal, that the parties should not have proceeded so far, and at such expense, would make the issue effectively unreviewable on appeal from final judgment.")

CONCLUSION

Interlocutory review is warranted here because the interest in avoiding excessively burdensome and expensive litigation is "significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule." *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003). Although the Court recognizes that the collateral order doctrine should be sparingly invoked, these cases more than qualify for certification under 28 U.S.C. § 1292(b). Moreover, given the need for certification, the Court will grant defendants' request to stay discovery pending appeal, but it expects the parties to seek expedited review in the Court of Appeals.

The Court therefore grants the defendants' request for certification and a stay of discovery pending resolution of the appeal. A separate Order accompanies this Memorandum Opinion.

ORDER

This matter is before the Court on defendant AT & T's Motion for Reconsideration or, in the Alternative, for Certification of an Interlocutory Appeal. Based on the pleadings, the record, and relevant case law, and for the reasons discussed in the Court's accompanying Memorandum Opinion, it is hereby

ORDERED that defendant's motion for reconsideration is **DENIED**; it is

FURTHER ORDERED that defendant's motion for certification of interlocutory appeal is **GRANTED**; and it is

FURTHER ORDERED that *APCC Servs., Inc. v. Cable & Wireless, Inc.*, 281 F.Supp.2d 52 (D.D.C. 2003) and *APCC Servs., Inc. v. AT & T Corp.*, 281 F.Supp.2d 41 (D.D.C. 2003) are certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) as they involve controlling questions of law as to which there is a substantial ground for difference of opinion, and an immediate appeal therefrom may materially advance the ultimate termination of this litigation; and it is

FURTHER ORDERED that discovery in the case is stayed pending action by the Court of Appeals, and the Clerk shall administratively close this case pending appeal.

SO ORDERED.

APPENDIX D

United States District Court
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A. 99-0696 ESH.
v.	*	Sept. 3, 2003.
AT& T CORPORATION,	*	
Defendant.	*	

MEMORANDUM OPINION

HUVELLE, District Judge.

On March 28, 2003, this Court dismissed claims brought by five of six plaintiffs against AT & T for payment of dial-around compensation allegedly owed to the payphone service providers ("PSPs") that plaintiffs represent.[1] The Court concluded that it lacked subject matter jurisdiction, finding that plaintiffs lacked Article III standing based on either the assignments executed by the PSPs or the doctrine of associational standing.[2] *See APCC*

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[1] This issue has spawned two other suits currently pending in this Court. *APCC Services, Inc. v. Cable & Wireless, Inc.*, Civ. No. 02-158; *APCC Services, Inc. v. Sprint Communications Co.*, Civ. No. 01-642.

[2] The Court's Memorandum Opinion and Order in *APCC I* was directed only to the aggregator plaintiffs and not plaintiff Peoples Telephone Company,

Services, Inc. v. AT & T Corp., 254 F.Supp.2d 135 (D.D.C. 2003) [hereinafter "*APCC I*"]. In response to this decision, the aggregator plaintiffs have now filed a Motion for Reconsideration ["Mot. for Recons."] and a Motion for Leave to Amend Complaint. Plaintiff Peoples Telephone Company has also filed a Motion for Leave to Amend.

In their Motion for Reconsideration, plaintiffs cite, for the first time, a host of authorities that recognize the validity of an assignment for collection and that offer a principled basis for differentiating an assignment of title to a claim, which vests assignees with legally enforceable rights, from an assignment merely of the right to bring suit, which does not. These authorities persuasively distinguish the instant matter from *Connecticut v. Physicians Health Services of Connecticut. Inc.*, 287 F.3d 110 (2d Cir.2002) – the primary case on which the Court relied in its prior Memorandum Opinion. The Court therefore no longer believes that this case can be decided based on *Physicians Health*, and instead will hold that the aggregator plaintiffs have standing based on the assignments from the PSPs they represent. Because the Court is vacating its March 28, 2003 Memorandum Opinion, it need not reach plaintiffs' motions to amend. It must, however, address defendant's challenge to the validity of plaintiff APCC Services' assignments under Virginia law. The Court finds this challenge to be unavailing. Accordingly, defendant's Motion to Dismiss Assignee Plaintiffs' Claims will be denied.

BACKGROUND

Plaintiffs APCC Services, Inc., Data Net Systems, LLC, Jaroth, Inc. d/b/a Pacific Telemanagement Services, NSC

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which is the only plaintiff in this matter that has brought an action on its own behalf. Thus, for the purposes of this Memorandum Opinion, the term "plaintiffs" excludes Peoples Telephone Company except where it is explicitly referenced.

Telemanagement Corp., Davel Communications Group, Inc., and Peoples Telephone Company, Inc. filed this action pursuant to sections 206 and 207 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 206, 207, on behalf of more than one thousand PSPs that own and operate over 400,000 public payphones throughout the United States.[3] (First Amended Complaint ["Am. Compl."] ¶¶ 1, 11.) Five of the six plaintiffs are "aggregators," or clearinghouses, created to streamline the billing and collection of dial-around compensation from common carriers of telephone calls, like defendant, who are subject to the compensation payment obligations mandated by section 276 of the Act. (*Id.* ¶ 10.) Pursuant to section 276, defendant is required to compensate PSPs for completed access code and toll free calls that are made using PSPs' payphones and carried over defendant's telephone network facilities. (*Id.* ¶ 1.) PSPs contract with aggregators to facilitate the billing and payment process.

Plaintiffs bring this suit as assignees of the claims of the PSPs they represent. The assignments provide that each PSP "assigns, transfers and sets over to [plaintiff] for purposes of collection all rights, title and interest of the [PSP] in the [PSP]'s claims, demands or causes of action for 'Dial-Around Compensation.' " (AT & T's Motion to Dismiss Assignee Plaintiffs' Claims ["AT & T Mot. to Dismiss"] Ex. A at 1.)[4] The assignments do not give plaintiffs the right to retain or share in any proceeds of the litigation. (*Id.*)

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[3] PSPs own, install, operate, manage, or maintain payphone services and facilities which enable callers to access the telephone network when away from their home or office. They recover the cost of the payphone services and facilities by receiving payment for their use from callers or from carriers. (Am. Compl.¶ 14.)

[4] During discovery, plaintiffs produced nearly 1,300 identical assignments from the PSPs they represent. (AT & T's Memorandum in Support of its Motion to Dismiss Assignee Plaintiffs' Claims at 2 n. 2.)

In January 2003, defendant filed a motion to dismiss for lack of subject matter jurisdiction, which challenged plaintiffs' standing to bring suit. Defendant argued that as assignees of the PSPs, plaintiffs did not suffer an injury-in-fact of their own and did not have a personal stake in the outcome of the litigation. Defendant further argued that even if plaintiffs have standing, APCC Services' claims cannot be assigned under applicable state law, and therefore, the assignments are invalid. Because the Court concluded that plaintiffs did not have standing to sue, it did not reach the validity of APCC Services' assignments. *See APCC I*, 254 F. Supp. 2d at 138. Defendant's motion was granted and the claims asserted by the aggregator plaintiffs were dismissed. *Id.* at 144.

Plaintiffs have now moved the Court to reconsider its decision or, alternatively, for leave to amend their complaint to substitute several independent payphone service providers to act as class representatives or to name all independent payphone service providers on whose behalf suit was initially brought. Plaintiff Peoples Telephone Company has also filed a similar motion for leave to amend. Defendant opposes these motions, arguing that plaintiffs are procedurally barred from moving for reconsideration; that the Court's prior finding of lack of standing is correct; and that leave to amend may not be granted given the lack of subject matter jurisdiction.

LEGAL ANALYSIS

I. Rule 54(b) Standard

Plaintiffs request the Court to reconsider its March 28, 2003 Memorandum Opinion and Order pursuant to Fed. R. Civ. P. 54(b). Under Rule 54(b), when multiple parties are involved in a case and an order adjudicating fewer than all the claims is issued, the order "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties" unless the court has directed the

entry of final judgment as to the particular claims addressed by the order. Fed. R. Civ. P. 54(b). Thus, Rule 54(b) "addresses interlocutory judgments." *Campbell v. United States Dep't of Justice*, 231 F.Supp.2d 1, 6 n. 8 (D.D.C. 2002). "Reconsideration of an interlocutory decision is available under the standard, 'as justice requires.' " *Id.* at 7 (quoting *Childers v. Slater*, 197 F.R.D. 185, 190 (D.D.C. 2000)). That standard "differs from the standards applied to final judgments under Federal Rules of Civil Procedure 59(e) and 60(b)," where the Court must find "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Id.* In arguing that the stricter standard of Rule 60(b) should be applied, defendant disregards this important distinction.[5]

The Court's March 28, 2003 ruling did not dispose of the entire matter as it did not involve one of the plaintiffs--Peoples Telephone Company. Nor did the Court expressly direct the entry of final judgment with respect to the claims addressed. Consequently, the order is interlocutory, and it may be revised where "justice requires." *See* Fed.R.Civ.P. 60(b) Advisory Comm. Notes ("[I]nterlocutory judgments are not brought within the restrictions of [Rule 60(b)], but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires."); *see also Childers*, 197 F.R.D. at 190.

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[5] Defendant relies on two cases that apply the stricter standard but do not specify the rules under which the moving party requested reconsideration. *See Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F.Supp.2d 1, 3 (D.D.C. 2002); *Cobell v. Norton*, 263 F.Supp.2d 58, 64 (D.D.C. 2003). Both cases were decided after *Campbell*, and neither challenges the view that a court may grant a motion to reconsider pursuant to Rule 54(b) "as justice requires."

II. Plaintiffs' Standing as Assignees

In *APCC I*, the Court was persuaded by defendant's argument that plaintiffs lacked standing because they were required to remit any damages to the PSPs, and thus, did not have a concrete stake in the outcome of the litigation. In opposition, plaintiffs relied almost exclusively on *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), arguing that the Supreme Court's decision in that case enshrines the principle that all assignments confer standing. Rejecting plaintiffs' overly expansive reading of *Vermont Agency*, the Court granted defendant's motion. While the Court remains of the view that *Vermont Agency* alone does not decide this case, plaintiffs have now presented more convincing authority for their position and have persuaded the Court that it was in error when it concluded that plaintiffs lacked standing. In particular, and as discussed below, plaintiffs have successfully differentiated the assignments at issue here, which convey legal title in the dial-around compensation claims, from those in *Physicians Health*, which conveyed merely the power of attorney to bring suit. Moreover, plaintiffs have established that the requirement that assignees ultimately account to assignors for any relief awarded is irrelevant in determining whether plaintiffs have a sufficient personal interest in the controversy to acquire standing. Accordingly, the Court concludes that it is in the interest of justice to reconsider and to vacate its March 28, 2003 Memorandum Opinion and Order.

A. Assignments for Collection

In their motion for reconsideration, plaintiffs present cogent arguments in support of their standing that go well beyond their initial reliance on *Vermont Agency*. Most importantly, they have for the first time now cited a long line of cases and legal treatises that recognize a well-established principle that assignees for collection purposes are entitled to bring suit where

the assignments transfer absolute title to the claims. (Mot. for Recons. at 11, 14.)

This right was explicitly recognized by the Supreme Court when it upheld the right of an assignee for collection to bring suit--even where the remedy awarded was obtained for the benefit of the assignors. *Spiller v. Atchison*, 253 U.S. 117, 40 S.Ct. 466, 64 L.Ed. 810 (1920). *Spiller* involved a suit brought by the assignee of 2,000 shippers complaining that certain railroads were charging excessive rates on the interstate shipment of cattle in violation of the requirements of the Interstate Commerce Act.[6] The Supreme Court upheld Spiller's right to bring suit to recover damages awarded to cattle shippers under a reparation order made by the Interstate Commerce Commission for unlawful freight overcharges on cattle shipments based on assignments from those cattle shippers.

> The assignments were absolute in form and plainly their effect * * * was to vest the legal title in Spiller. What they did not pass to him was the beneficial or equitable title. But this was not necessary to support the right of the assignee to claim an award or reparation and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims; especially since it appeared that such was the real purpose of the assignments.

Id. at 134, 40 S.Ct. 466. The Supreme Court thus found that the assignments conferred upon Spiller a sufficient interest in the claims to entitle him to bring suit even though he was obligated

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[6] It is worth pointing out that the illegal charge provisions in the ICA under which Spiller recovered became the model for the comparable provisions in the Communications Act under which the present plaintiffs seek to recover. *See AT & T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 221-22, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998).

to remit the proceeds of the suit to the shippers that had assigned their claims.

Similarly, in *Titus v. Wallick*, 306 U.S. 282, 59 S.Ct. 557, 83 L.Ed. 653 (1939), the Supreme Court ruled that assignments transferring "all right, title and interest" in a claim gave petitioner the right to bring suit even though a separate agreement between the assignor and petitioner required that petitioner turn over the proceeds of the claim to the assignor. *Id.* at 286, 59 S.Ct. 557. In reaching this conclusion, the Supreme Court observed:

> [A]ny form of assignment which purports to assign or transfer a chose in action confers upon the transferee such title or ownership as will enable him to sue upon it. This is true even though the assignment is for the purpose of suit only and the transferee is obligated to account for the proceeds of suit to his assignor.

Id. at 289, 59 S.Ct. 557. It is thus well settled that the validity of an assignment (and therefore the status of the assignee as the real party in interest under Fed. R. Civ. P. 17)[7] is not affected by the "parties' additional agreement that the transferee will be obligated to account for the proceeds of a suit brought on the claim." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir.1997); *see also United States ex rel. Wolther v. N.H. Fire Ins.*, 173 F.Supp. 529, 537 (E.D.N.Y. 1959) ("[A]n assignee is the real party in interest * * * if he has some title, legal or equitable, to the thing assigned. The

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[7] Rule 17(a) requires that "[e]very action * * * be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). The rule ensures that an action will be brought by the person who is entitled to enforce the right under the governing substantive law. *See* 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1543 (2d ed.1990). Rule 17(a) does not, however, require that suit "be brought in the name of the person who ultimately will benefit from the recovery." *Id.*

consideration paid, the purpose of the assignment, the use to be made of any proceeds collected, is immaterial.") (quotation omitted); *cf. Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1282 (9th Cir. 1983) ("An assignment of claims does not prevent the assignors from receiving the benefits of litigation.").

The critical distinction differentiating between valid and invalid assignments is thus not whether the assignor will ultimately obtain the proceeds of the suit, but rather whether the assignment manifests "an intent to divest the assignor of all control and right to his claim, thereby empowering the assignee to control the cause of action and to receive its fruits." *Advanced Magnetics*, 106 F.3d at 15 (citation and quotation omitted). "An assignee for the purposes of collection holds legal title to the debt and is a real party in interest, even though the assignee must account to the assignor for whatever is recovered in this action." *Airlines Reporting Corp. v. S and N Travel, Inc.*, 857 F.Supp. 1043, 1047 (E.D.N.Y. 1994); *see also* 4 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 17.11[1][a], [c] (3d ed. 1997) ("Under a valid assignment, the assignee of a claim becomes the real party in interest for that claim* * *. The assignee is real party in interest even though assignee must account to the assignor.").

Such a valid assignment must be contrasted with a "provision by which one person grants another the power to sue on and collect on a claim [which] confers on the grantee a power of attorney with respect to that claim." *Advanced Magnetics*, 106 F.3d at 17. Such an assignment – for example one that conveys merely "the power to commence and prosecute * * * any suits, actions or proceedings at law or in equity in any court of competent jurisdiction" – does not demonstrate an intent to transfer ownership or title to a claim, and therefore does not entitle the assignee to bring suit in his own name. *Id.* at 14, 18; *see also Titus*, 306 U.S. at 289, 59 S.Ct. 557 ("[A] power of attorney to sue, standing alone, does not * * * operate

as an assignment to vest the [assignee] with such title or interest as will enable him to maintain the suit in his own name."); *Airlines Reporting*, 857 F.Supp. at 1046-47 (observing that a "person authorized to bring suit solely on the basis of a power of attorney is not a real party in interest.")

With these principles in mind, the test for determining whether an assignee may bring suit as a real party in interest is whether the assignment transfers legal title to the claim or instead merely transfers a power of attorney. There can be little question that the assignments currently before the Court, which purport to transfer ownership of the right to collect, give plaintiffs legal title to the dial-around-compensation claims. As such, they convey an interest in these claims sufficient to entitle plaintiffs to initiate legal action. Neither the fact that the assignments are for collection purposes nor the fact that plaintiffs are obligated under a separate agreement to remit the proceeds of any legal action to the PSPs negates plaintiffs' present interest in the claims or their right to bring suit. Defendant does not seriously contend otherwise. Instead, while acknowledging the case law described above, defendant argues that plaintiffs have erroneously conflated real party in interest status under Fed. R. Civ. P. 17 with Article III standing, and that even if the holder of a valid assignment may be entitled to bring suit as the real party in interest, "the real issue before the Court is subject matter jurisdiction." (AT & T Opp. at 5.)

Defendant is correct in pointing out that "Rule 17 does not provide an independent basis for jurisdiction" (AT & T Opp. at 5), and that a plaintiff must be both the real party in interest and have standing to bring suit. WRIGHT, *supra* § 1542. This argument, however, is something of a red herring. As the D.C. Circuit has recognized, "[s]tanding and real-party-in interest questions * * * overlap to the extent that both ask whether the plaintiff has a personal interest in the controversy." *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992). Indeed, "[g]enerally real parties in interest have standing," MOORE, *supra* § 17.10[1].

For both statuses require that plaintiffs "possess[ ] a sufficient interest in the action to entitle * * * [them] to be heard on the merits." WRIGHT, *supra* § 1542. Thus, if a valid assignment transfers an interest sufficient to make the assignee a real party in interest, it logically follows that the assignee will then have the "concrete interest" in the litigation required by the standing doctrine. This is so because what has been assigned in such cases is, in effect, the legal "injury" that generates Article III standing. In other words, the assignment in such cases conveys to the assignee not merely the power to assert a claim on another's behalf, but also the right to vindicate a legal wrong done to the assignor as if that wrong had been done to the assignee itself. Any other conclusion would mean that a real party in interest who has been assigned a claim for collection purposes would never have standing to sue (because the underlying legal injury would have never been done to the assignee itself), which--as we have just seen--is certainly not the law. *See also* MOORE, *supra* § 17.11[1][c] (citing cases in the Second, Ninth, Tenth, and Eleventh Circuits).

And indeed, the cases cited by defendant do not suggest otherwise. Defendant relies on *Whelan* to distinguish between Article III jurisdiction and real party in interest status under Rule 17. (AT&T Opp. at 6-7.) In that case, defendants' challenge to plaintiffs' real party in interest status was barred because defendants did not raise the issue until the first day of trial--thus prejudicing the real party by undue delay. On appeal, defendants attempted to recast their real party in interest challenge into a jurisdictional challenge under Article III, which, unlike Rule 17(a), can be raised at any time.[8] *Whelan*,

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[8] Rule 17(a) provides that "[n]o action shall be dismissed on real-party-in-interest grounds until a reasonable time has been allowed after objection for ratification of commencement of the action by * * * the real party in interest* * *.This implies that the defense may not be raised at any time, for the real party must have the opportunity to step into the 'unreal' party's shoes and should not be prejudiced by undue delay." *Whelan*, 953

953 F.2d at 671. The Court rejected this effort, noting that plaintiffs had clearly suffered an injury and thus had standing to sue. *Id.* at 672. Defendant suggests that since the D.C. Circuit rejected the *Whelan* defendants' effort to recast a Rule 17 challenge into a standing issue, plaintiffs should similarly be precluded here from converting a standing challenge into a Rule 17 issue.

This argument, however, misconstrues both the facts of this case and the holding in *Whelan*. Plaintiffs here are not attempting to recast a standing issue as a Rule 17 issue. They merely highlight the fact, recognized in *Whelan*, that the two standards share a common element. *See id.* (observing that both standards require that "plaintiff has a personal interest in the controversy"). It is true that the D.C. Circuit recognized that a party with standing may not always be the real party in interest (i.e. the party with the right to bring suit under substantive law). For example, where a closely-held corporation is injured, a shareholder has standing to sue (as an injured party), but that shareholder must also possess the right under governing substantive law to bring suit as the real party in interest; the injury alone is not sufficient. This rule, however, does not imply its converse. And, indeed, as a leading treatise has recognized, although "not every party who meets standing requirements is a real party in interest," real parties in interest generally have standing. MOORE, *supra* § 17.10[1]. The injury that has generated the suit is theirs to vindicate. Nothing in *Whelan* suggests otherwise. Here, the Court has now been persuaded that the assignment has given plaintiffs the requisite interest in the controversy to make them real parties in interest. And nothing has been presented that would tend to cast doubt upon their standing to sue in light of that status.

F.2d at 672. Thus, the Court held that it was an abuse of discretion to allow a Rule 17(a) defense "as late as the start of the trial if the real party has been prejudiced by the defendant's laxness." *Id.*

Defendant fails to cite any cases in which an assignee for collection was found to lack standing. Instead, it relies only on cases that question whether assignments for collection were made collusively in order to create federal diversity jurisdiction in violation of 28 U.S.C. § 1359.[9] (AT&T Opp. at 8-10.) These cases hold that an assignee of title solely for collection purposes may bring suit in federal court based on diversity jurisdiction only if there is complete diversity based on the assignor's citizenship. They do not address Article III standing. *E.g.*, *Airlines Reporting Corp. v. S and N Travel*, 58 F.3d 857, 862-64 n. 4 (2d Cir.1995) (holding that though an assignee was the real party in interest under Rule 17(a), the assignments were collusively made for the purpose of manufacturing federal jurisdiction and therefore there was no true diversity of citizenship); *Attorneys Trust v. Videotape Computer Prods.*, 93 F.3d 593 (9th Cir.1996) (assignee of title for collection only may bring suit in federal court where court has diversity jurisdiction based on assignor's citizenship).[10] In the present case, of course, diversity is not in dispute, as the Court's subject-matter jurisdiction is based on the existence of a federal question. As such, the cases relied upon by defendant, which having nothing to say about whether an assignee for collection has standing to sue, are simply inapposite.

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[9] Under section 1359, "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359.

[10] Defendant's reliance on *Compton v. Atwell*, 207 F.2d 139 (D.C. Cir.1953), is equally unconvincing given that the Court there held that the plaintiff, an assignee for collection only, could bring suit for the benefit of other creditors of the defendant. The assignee's standing was not challenged – only his status as a real party in interest. In any event, the Court concluded that it did not need to determine whether the assignee was the real party in interest because plaintiff was authorized to bring suit pursuant to an exception to the real party in interest requirement enumerated in Rule 17(a). *Id.* at 141.

B. *Physicians Health*

In *APCC I*, this Court relied on a Second Circuit decision which held that where an assignment does not convey a concrete stake in the outcome of the litigation, the assignee/plaintiff (there, the State of Connecticut) does not "suffer an injury of a nature that would confer standing upon it under Article III of the Constitution." *Physicians Health*, 287 F.3d at 115. Invoking this approach, this Court observed:

> Plaintiffs' situation is precisely the same as that of the State of Connecticut. The assignments on which plaintiffs rely for standing do not shift the loss suffered by the PSPs to the aggregators that represent them* * *. And while the Second Circuit recognized that there are some situations where the assignment of a claim may confer standing on an assignee who has not incurred an injury, expense or loss in exchange for the assignment, the Court made clear that such a " 'claim' cannot simply refer to a right to bring suit." Since plaintiffs' assignments in this case grant only the right to sue and not a right to a remedy, plaintiffs have failed to establish standing.

APCC I, 254 F.Supp.2d at 139 (citations omitted). The Court now believes that it erred in viewing these two situations as indistinguishable.

In *Physicians Health*, the State of Connecticut brought suit under ERISA against an insurance company that offered managed care plans to Connecticut residents. The State asserted standing to sue as the assignee of participants in the managed care plans who had been injured by the plans' actions and who had assigned their right to seek injunctive or other equitable relief to the State. However, the plan participants had assigned to the State only "their right to seek 'appropriate equitable relief' with respect to any 'cause of action' they may have as plan participants or beneficiaries." 287 F.3d at 112. As such, the

assignments did not reflect an intent to transfer title or ownership of the assignors' claims, but instead merely conferred a power of attorney with respect to that claim, that is, "the right to control the equitable portion of a lawsuit seeking redress of the assignor-participants' rights under ERISA." *Id.* at 118. Because only the right to sue was assigned and the State had no personal interest in the outcome of the suit, the Second Circuit concluded that the assignment did not convey a concrete stake in the litigation, and therefore that the State lacked standing to sue. *Id.* at 118- 19.

For purposes of the standing inquiry, however, the Second Circuit contrasted such an assignment with a different type that would generate a different result: "even though an assignee incurs no injury, expense, or loss in exchange for the assignment, a valid and binding assignment of a claim (or a portion thereof) – not only the right or ability to bring suit – may confer standing on the assignee." *Id.* at 117 (emphasis added). Thus, in *Vermont Agency*, the Supreme Court held a relator in a qui tam action brought under the False Claims Act had constitutional standing notwithstanding the fact that such a party suffers no direct injury from the defendant's alleged wrongdoing. The Court based its conclusion on the "doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." 529 U.S. at 774, 120 S.Ct. 1858. While this doctrine may not always apply (as *Physicians Health* makes clear), it does in the present case.

That is so because the assignments at issue, which provide that each PSP "assigns, transfers and sets over * * * for purposes of collection, all rights, title and interest of the Company in the Company's claims, demands or causes of action for Dial-Around Compensation due the Company," clearly manifest the PSPs' intention to transfer legal title of the claims to plaintiffs. As a result, plaintiffs here actually own the claims at issue (a power the State of Connecticut lacked), and therefore are entitled to bring this suit in their own name. *See* 287 F.3d

at 118-19 (emphasizing the fact that the assignments merely gave the State "the right to act as a nominal party"). Moreover, as described above, this transfer of ownership also transfers the legal injury that is the basis for the Article III standing.[11] In this sense, it is significant that the assignments in *Physicians Health* did not provide for a remedy on which the State itself could collect, but were solely for injunctive relief, which could have benefitted only the punitive assignors and not the nominal plaintiff. Such an assignment left the underlying injury with the plan beneficiaries, and meant that a favorable judicial ruling would not have alleviated any harm suffered by the State, or redounded to its direct benefit. Accordingly, the State did not "stand[ ] in the assignor's stead with respect to both injury and remedy," and thus was without standing to sue. *Id.* at 117.

Here, in contrast, the assignments allow plaintiffs to seek a remedy (money damages) that, if awarded, would run to plaintiffs directly and satisfy their claims – even though they are ultimately obligated to remit any damages awarded to the PSPs. Accordingly, by virtue of the assignments, plaintiffs have come to stand in the place of the PSPs with respect to both injury and remedy. Unlike the State of Connecticut, they are the legal owners of the claims they assert and have the exclusive right to collect on those claims; they thus have a concrete stake in the outcome of the litigation sufficient to satisfy the injury-in-fact requirements of Article III. And, a decision ordering defendant to compensate plaintiffs would redress this injury. Under the framework set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), plaintiffs therefore have standing to bring this suit.

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[11] Or, to put the same concept in different terms, the assignment may be said to confer on the assignee a kind of "representational standing." *Vermont Agency*, 529 U.S. at 774, 120 S.Ct. 1858.

III. Assignability of Claims under Applicable Law

In their initial motion to dismiss, defendant argued that even if plaintiffs have standing, the claims made by plaintiff APCC Services on behalf of its assignors must be dismissed because those claims are not assignable under Virginia law. As the Court has determined that plaintiffs have standing to sue, it must now address this issue.

Defendant argues that the claims asserted by plaintiffs are not assignable under Virginia law, which limits the types of claims that may be assigned to "causes of action for damage to real or personal property." Va. Code Ann. § 8.01-26 (West 2003). It is, however, irrelevant whether this state statute would actually bar the assignment of the claims asserted. Defendant's argument fails because plaintiffs' claims are based on violations of federal law, and it is well settled that "[w]here a claim for relief is created by federal statute, federal law governs the assignability of the claim." *In re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Sec. Lit.*, 636 F.Supp. 1138, 1152 (C.D. Cal.1986) (assignability of RICO treble claim is one of federal law); *see also Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 85 F.3d 970, 973 (2d Cir.1996) ("The federal courts have consistently determined that federal law governs the assignability of claims under the federal securities laws."); *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 437 (3d Cir.1993) (Greenberg, J., concurring) ("the validity of the assignment of an antitrust claim is a matter of federal common law").

CONCLUSION

For the reasons discussed above, the Court concludes that plaintiffs have standing to bring this suit based on the assignments from the PSPs and that these assignments are legally permissible. The Court therefore grants plaintiffs' motion for reconsideration, and vacates its March 28, 2003

Memorandum Opinion and Order. Given these rulings, the remaining motions to amend have been rendered moot. A separate Order accompanies this Memorandum Opinion.

ORDER

This matter is before the Court on plaintiffs' motions for reconsideration and for leave to amend its complaint and plaintiff Peoples Telephone Company's motion for leave to amend. Based on the pleadings, the record, and relevant case law, it is hereby

ORDERED that plaintiffs Motion for Reconsideration is **GRANTED**; it is

FURTHER ORDERED that the Court's March 28, 2003 Memorandum Opinion in *APCC Servs. v. AT&T*, 254 F.Supp.2d 135 (D.D.C. 2003), and corresponding Order are **VACATED**; it is

FURTHER ORDERED that AT&T's Motion to Dismiss Assignee Plaintiffs' Claims is **DENIED**; it is

FURTHER ORDERED that the Aggregators' Motion for Leave to Amend is **DENIED AS MOOT**; it is

FURTHER ORDERED that Peoples Telephone Company's Motion for Leave to Amend is **DENIED AS MOOT**; and it is

FURTHER ORDERED that Defendant AT & T's Motion to Seal is **GRANTED**.

SO ORDERED.

APPENDIX E

United States District Court
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A. 01-642 ESH
v.	*	Sept. 3, 2003.
SPRINT COMM'N CO., L.P.	*	
Defendant.	*	

ORDER

This matter is before the Court on plaintiffs' motion for leave to amend and defendant's cross-motion to dismiss for lack of subject matter jurisdiction. This case is substantially identical to those presented in *APCC Services, Inc. v. AT&T*, Civ No 99-696, and the issues raised by the parties are addressed in the Court's Memorandum Opinion and Order in the *AT&T* case issued on this date. Based on the pleadings, the record, and relevant case law, and for the reasons discussed in the Court's concurrently-issued opinion in the *AT&T* case, it is hereby

ORDERED that plaintiffs' Motion for Leave to Amend is **GRANTED IN PART** with respect to additional grounds for relief and **DENIED AS MOOT** with respect to joinder of plaintiffs; and it is

FURTHER ORDERED that defendant's Cross-Motion to Dismiss for Lack of Subject Matter Jurisdiction is **DENIED**.

SO ORDERED.

APPENDIX F

United States District Court
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A. 02-0158 ESH
v.	*	Sept. 3, 2003.
CABLE & WIRELESS, INC,	*	
Defendant.	*	

MEMORANDUM OPINION

HUVELLE, District Judge.

This case is one of several before the Court that have been brought pursuant to sections 206 and 207 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 206, 207.[1] Plaintiffs in these cases seek to collect payment of so-called "dial-around compensation" from a common carrier of telephone calls pursuant to the compensation payment obligations mandated by section 276 of the Act and its implementing regulations. Plaintiffs are aggregators or

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[1] *See also APCC Services, Inc. v. AT & T Corp.*, Civ. No. 99- 0696 (D.D.C.) ("*AT & T*"), and *APCC Services, Inc. v. Sprint Communications Co.*, Civ. No. 02-0642 (D.D.C.).

clearinghouses and have brought suit as assignees of the claims of various payphone service providers ("PSPs").[2]

In each case, the Court faces the same initial hurdle of whether plaintiffs have Article III standing. While the Court initially dismissed one of these cases on March 28, 2003, finding that plaintiffs lacked standing (*see APCC Services, Inc. v. AT & T Corp.*, 254 F.Supp.2d 135 (D.D.C.2003)), by a Memorandum Opinion issued today, it has granted reconsideration and reinstated that action, having now concluded that the assignments executed by the PSPs bestow on the aggregator-plaintiffs standing sufficient to survive an Article III challenge. Because Cable & Wireless, Inc. ("C & W") presents the same arguments for dismissal based on lack of standing as did AT & T, the Court's newly issued Memorandum Opinion in *AT & T* also resolves C & W's Motion to Dismiss for Lack of Subject Matter Jurisdiction.[3]

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[2] PSPs own and operate over 400,000 public payphones throughout the United States.

[3] In its reply, C & W presents a slightly new wrinkle on its standing argument. Pointing to the fact that plaintiffs and several PSPs have recently filed separate class actions to collect unpaid dial-around compensation (*see, e.g., D & B Telephones, Inc. v. Cable and Wireless, Inc.*, Civ. No. 03-1442 (D.D.C. June 30, 2003)), defendant argues that the plaintiffs could not have standing here based on the PSPs assignments, since the PSPs could not have both assigned their rights to the plaintiffs and retained their rights for purposes of bringing a class action. (C & W's Reply at 2-3.) The complaints in the class actions, however, explain that the suits were brought as a result of the Court's earlier decision dismissing the AT & T case so that the PSPs could "proceed with their claims against C & W without undue delay if the Court adheres to the March 28, 2003 decision and dismisses their claims against C & W." (*D & B Telephones, Inc.*, Civ. No. 03-1442, Compl. at 2.) Thus, the class actions will only be prosecuted in the event that plaintiffs cannot pursue the PSPs claims as their assignees. And the filing of the class actions has no relevance to a determination of whether plaintiffs have standing based on the assignments.

In light of its denial of C & W's motion to dismiss for lack of subject matter jurisdiction, the Court must now address the two remaining motions in this case: (1) C & W's Rule 12(b)(6) motion to dismiss on the grounds that plaintiffs cannot state a claim under section 276 because that statutory provision does not provide for a private right of action; and (2) plaintiffs' motion to amend to add additional grounds for relief under the Communications Act.[4]

LEGAL ANALYSIS

I. Private Right of Action

The issue presented by C & W's motion is whether section 276(b)(1)(A) of the Communications Act and its implementing regulation, codified at 47 C.F.R. § 64.1300 et seq, confer a private right of action based on a common carrier's alleged failure to pay adequate dial-around compensation. Plaintiffs base their claims on sections 206 and 207 of the Act. Section 206 provides that if a common carrier "shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful * * * such common carrier shall be liable to the person or persons injured thereby." 47 U.S.C. § 206. Section 207, in turn, permits the bringing of a suit "for the recovery of damages for which such common carrier may be liable under the provisions of this chapter." 47 U.S.C. § 207.

The Act addresses dial-around compensation in section 276(b)(1)(A), which directs the Federal Communications Commission (FCC) to prescribe regulations that "establish a per

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[4] Plaintiffs have also moved in all cases to amend their complaint to join the PSPs in the event that plaintiffs are found to lack standing. Since the Court has concluded that plaintiffs have standing, their motion to amend to add the PSPs is now moot.

call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). While section 276 does not speak in terms of a private right of action, sections 206 and 207 clearly allow private suits to recover damages based on violations of rights protected by the Act. In this case, however, defendant argues that plaintiffs' claims are not actionable under those provisions because the claims do not allege a violation of section 276 itself, but only of the regulations promulgated pursuant thereto.[5] Defendant notes that section 276 is "merely a directive to the FCC to promulgate regulations regarding [the payment of] DAC [compensation]" and that, as a result, only the FCC's failure to create such regulations would amount to a violation. (Def.'s Mem. at 22-23.) Defendant contends that because it is only the regulation that requires specific payment, the failure to pay violates only the regulation, and thus cannot be enforced through the private right of action created by sections 206 and 207.

This very issue has been addressed by district courts with mixed results. *Compare Precision Pay Phones v. Qwest Communications Corp.*, 210 F.Supp.2d 1106, 1113 n. 3 (N.D.

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[5] The regulation provides in relevant part:

> (a) * * * the first facilities-based interexchange carrier to which a completed coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier shall compensate the payphone service provider for the call at a rate agreed upon the parties by contract.
>
> * * * * * *
>
> (c) In the absence of an agreement as required by paragraph (a) of this section, the carrier is obligated to compensate the pay phone service provider at a per-call rate of $.24.

47 C.F.R. § 64.1300.

Cal. 2002) (holding that private right of action exists to enforce section 276 regulations and citing cases reaching that conclusion), *with Phonetel Tech., Inc. v. Network Enhanced Telecomm.*, 197 F.Supp.2d 720, 722 (E.D. Tex.2002), *Greene v. Sprint Communications*, No. 02- CV-3841 (C.D. Cal. July 2, 2002), appeal docketed, No. 02-56339 (9th Cir. 2002), *W. Communications Sys. v. Global Crossing Telecomm., Inc.*, No. 01-CV-1468 (S.D. Cal. Sept. 20, 2001) (holding that no private right of action exists).[6]

No court in this jurisdiction has squarely confronted the issue of whether there is either an explicit or implied private right of action to sue for dial-around compensation. The D.C. Circuit has, however, recognized that where a local exchange carrier exceeds the maximum rate-of-return established by the FCC, the carrier thereby violates section 201(b)'s mandate that a carrier must maintain "just and reasonable" rates, 47 U.S.C. § 201(b), and the carrier's customer may sue for damages under section 206. *See MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1413-14 (D.C. Cir. 1995). In reaching this conclusion, the Court reiterated its position that rate, as well as rate-of-return, prescriptions have the force of law. *Id.* While MCI is instructive, since the Court appears to recognize that an FCC order finding that a carrier violated a rate regulation is actionable under section 206, it does not completely resolve the issue here as it involved a challenge to an FCC order rather than a suit between private parties.

While the teaching of MCI is helpful, the most relevant case bearing on whether a private right of action extends to a

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[6] As is obvious from these cases, common carriers have taken inconsistent positions on this issue. For instance, Global Crossing argued in favor of a private right of action in *W. Communications*, whereas Sprint took the opposite position in *Greene*. Curiously, in their cases before this Court, neither Sprint nor AT & T has advanced this argument for dismissing plaintiffs' suits.

violation of a regulation is *Alexander v. Sandoval*, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), which defendant unfortunately does not meaningfully address. In *Sandoval*, the Supreme Court held that "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Id.* at 284, 121 S.Ct. 1511. The issue there was the existence of a private right of action to enforce regulations promulgated under section 602 of Title VI of the Civil Rights Act of 1964. Section 601 of Title VI prohibits recipients of federal funds from engaging in racial or national origin discrimination. It has been interpreted to prohibit only intentional discrimination and to provide a private right of action. *Id.* at 279-80, 121 S.Ct. 1511. Section 602 of Title VI authorizes federal agencies to promulgate regulations to effectuate section 601. The regulations at issue in *Sandoval*, promulgated under section 602, prohibit recipients of federal funds from engaging in facially neutral practices which have a disparate impact. Since the Court found that the regulations went beyond the substantive provisions of section 601, which bar only intentional discrimination, it concluded that the private right of action to enforce section 601 did not also encompass a right to enforce disparate-impact regulations. *Id.* at 281-82, 121 S.Ct. 1511. However, the Court affirmed that the regulations applying the ban on intentional discrimination provided for in section 601 came within the private right of action to enforce the statute. *Id.* at 284, 121 S.Ct. 1511.

Sandoval's analysis is directly relevant here. The Supreme Court found that the "regulations applying § 601's ban on intentional discrimination are covered by the [private] cause of action to enforce that section," because "[s]uch regulations * * * authoritatively construe the statute itself, * * * and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute." *Id.* (citations omitted). In contrast, the Court found that "the disparate-impact regulations do not simply apply § 601 – since they indeed forbid

conduct that § 601 permits – and [it is] therefore clear that the private right of action to enforce section 601 does not include a private right to enforce these regulations." *Id.* at 285, 121 S.Ct. 1511.

Thus, the Supreme Court found that the private right of action contained in section 601 included a right to vindicate violations of the regulations implementing section 601's ban on intentional discrimination because the regulations simply interpreted and implemented the statute and did not substantively expand it. The same is true with the statutory provision (section 276(b)(1)(A)) and the regulation (47 C.F.R. § 64.1300) at issue here. *See Precision Pay Phones*, 210 F.Supp.2d at 1115 (applying *Sandoval* in this context). The statute is not merely a directive to the FCC as defendant suggests – it confers upon PSPs a right to be "fairly compensated for each and every completed intrastate and interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1)(A). The regulation, in turn, simply provides the details necessary to implement the statutory right created by section 276. Like the intentional discrimination regulations in *Sandoval*,

> "[I]t is meaningless to talk about a separate cause of action to enforce" the FCC regulation at 47 CFR 64.1300 apart [from] its authorizing statute, 47 U.S.C. 276(b)(1)(A). A suit to enforce the right of PSPs under 276(b)(1)(A) to be "fairly compensated" would be meaningless without the FCC regulation which specifies the precise level of that compensation.

Precision Pay Phones, 210 F.Supp.2d at 1115 (quoting *Sandoval*, 532 U.S. at 284, 121 S.Ct. 1511).[7] And unlike the

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[7] *Precision Pay Phones* held in the alternative that an implied private right of action may be found under the analytical framework set forth in *Cort v. Ash*,

disparate impact regulations in *Sandoval*, which "did not simply fill in interstices left by the statute, but created a substantive standard which differed from the statute," *id.* at 1115, the rate prescriptions set forth by the FCC in 47 C.F.R. § 64.1300, constitute the "authoritative interpretation of the statute" under which they were promulgated. *Sandoval*, 532 U.S. at 284, 121 S.Ct. 1511. In other words, 47 C.F.R. § 64.1300 implements the Congressional mandate embodied in section 276(b)(1)(A) by specifying what it means to be "fairly compensated"; as such, when a common carrier violates the regulation, it is effectively doing something "declared to be unlawful" within the meaning of section 206 and is therefore subject to suit under section 207. The relationship between the regulation and the statute is direct and mutually reinforcing; the former gives definition and substance to the latter and does not create a different substantive standard. Thus, under *Sandoval's* rationale, the regulation can be enforced by the statute's private right of action and defendant's argument to the contrary must be rejected.

The cases on which defendant relies do not address *Sandoval*, but instead rely primarily on *Conboy v. AT & T Corp.*, 241 F.3d 242 (2d Cir. 2001). This reliance, which defendant echoes, is misplaced for several reasons. First, *Conboy* was decided before *Sandoval*; as such, to the extent that the Second Circuit's decision can be read to preclude all private rights of action for violations of FCC regulations, that reasoning is inconsistent with that of the Supreme Court and thus cannot stand.[8] Moreover, *Conboy* dealt with different

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422 U.S. 66, 85, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). *Precision Pay Phones*, 210 F.Supp.2d at 1115. In light of its conclusion that Congress has provided an express right of action that covers the claims brought in this case, this Court need not address the implied right of action issue.

[8] Such a reading would also be arguably inconsistent with *MCI*'s recognition that the FCC's prescriptions as to rates and rates of return have the "force of a statute" and are actionable under section 206. *MCI*, 59 F.3d at 1414.

regulations, which governed the use of subscriber account information, and its holding as to the private right of action issue was expressly limited to those two regulations. *See* 241 F.3d at 252. So limited, this result is consistent with *Sandoval*, which instructs courts not to treat all regulations as enforceable by a private party, but rather, to carefully scrutinize the relationship between the authorizing statute and the regulations. *Sandoval*, 532 U.S. at 284, 121 S.Ct. 1511; *Precision Pay Phones*, 210 F.Supp.2d at 1115 n. 6. As discussed above, that relationship here is far tighter than it was in *Conboy* and thus supports a different result from the one reached there. Finally, and perhaps most significantly, *Conboy* had no reason to address the interplay of the regulations at issue and sections 206 and 207, as plaintiffs there had not alleged recoverable monetary damages under those statutory provisions. *Id.* at 247-48.

For these reasons, the Court concludes that plaintiffs have a right of action to challenge defendant's alleged failure to meet the dial-around compensation obligations imposed by section 64.1300, and will therefore deny C & W's 12(b) motion to dismiss.

II. Plaintiffs' Motion to Amend

This leaves plaintiffs' motion to amend their complaint. Plaintiffs seek to add additional grounds for relief under the Communications Act that arise out of the same alleged misconduct already set forth. Under FED R. CIV. P. 15(a), a party may amend a complaint after an answer is filed, but only with leave of court. In deciding whether to grant leave, a court should take into account whether there has been bad faith, undue delay or prejudice to the defendant, and should reject a proposed amendment that would be futile. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1084 (D.C. Cir.1998). If none of these factors is present, leave to

amend "should, as the rules require, be 'freely given.' " *Foman*, 371 U.S. at 182, 83 S.Ct. 227 (quoting FED R. CIV. P. 15(a)).

In their proposed amendment, plaintiffs seek to add a claim under 47 U.S.C. § 201(b), arguing that defendant's failure to fully and fairly compensate the PSPs, as required by 47 C.F.R. § 64.1300, is an unjust and unreasonable practice prohibited by section 201(b).[9] Plaintiffs also wish to assert violations of sections 416(c) and 407, both of which speak in terms of FCC "orders."[10] Plaintiffs assert that defendant's failure to meet the requirements of the dial-around compensation regulation amounts to a violation of an agency "order" within the meaning of these provisions. Defendant resists these amendments, arguing that section 201(b) does not confer a private right of action and that sections 407 and 416(c) are not concerned with violations of FCC rules, but rather only with violations of the agency's adjudicatory orders. Each of these arguments is considered below.

A. Section 201(b)

As the Court has concluded above, sections 206 and 207 establish a private right of action to sue common carriers for violations of the Act, as well as for regulations authoritatively interpreting its provisions. In *MCI*, this Circuit determined that the FCC may treat a violation of a regulation that establishes a rate (*i.e.*, a rate-of-return prescription) as a violation of section

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[9] Section 201(b) declares unlawful "[a]ll charges [and] practices * * * in connection with such communications service * * * that [are] unjust or unreasonable."

[10] Section 416(c) provides that "[i]t shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with such orders so long as the same shall remain in effect." Section 407 provides that "[i]f a carrier does not comply with an order for the payment of money," the person for whose benefit the order was made may sue for damages in district court.

201(b)'s requirement that a common carrier maintain "just and reasonable" rates and therefore as actionable under section 206. *MCI*, 59 F.3d at 1413-14. It follows from this that a violation of agency regulations setting forth a binding rate schedule for pay phone compensation similarly constitutes an unjust and unreasonable rate practice that is similarly actionable under sections 206 and 207.

In response, C & W cites to *US West, Inc. v. Business Discount Plan, Inc.*, 196 F.R.D. 576 (D. Colo. 2000), and *Maydak v. Bonded Credit Co.*, 96 F.3d 1332 (9th Cir.1996). These cases are of no assistance, since in both the plaintiff sued a non-common carrier, whereas sections 206 and 207 are expressly limited to damage claims against common carriers. Thus, in *US West*, the court concluded that because a plaintiff could not sue a non-common carrier under sections 206 and 207, it could not bring a private right action for damages against such an entity based on an alleged violation of section 201(b). *See* 196 F.R.D. at 588. *Maydak*'s holding is also limited to the conclusion that no explicit or implied private action exists for a plaintiff to sue a non-common carrier. *See* 96 F.3d at 1334.[11] Therefore, although the section 201(b) claim appears not to add anything to plaintiffs' case beyond what is already covered by the claims expressly based on section 276 and its implementing regulations, the Court will allow this amendment. If these claims turn out merely to duplicate one another (as the Court's suspects), that issue can be resolved at a later date.

B. Sections 416(c) and 407

Plaintiffs next argue that the FCC regulations requiring common carriers to compensate payphone service providers are

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[11] If anything, *Maydak* supports plaintiff's position, since it recognized that if plaintiff had sued AT & T (instead of a non-common carrier) for violating sections 203(a) and (c) of the Act, the court would have had subject matter jurisdiction under sections 206 and 207. *See* 96 F.3d at 1334.

"orders" for the purpose of these statutory provisions. As a result, they contend, defendant's alleged violation of these regulations amounts to a violation of sections 416(c) and 407, which violations are actionable under sections 206 and 207.

Citing the First Circuit's opinion in *New England Tel. & Tel. Co. v. Pub. Util. Comm'n*, 742 F.2d 1 (1st Cir.1984) ("*NETT*"), defendant argues that only adjudicatory orders and not FCC regulations constitute "orders" under the Communications Act. While the First Circuit based its interpretation of the word "order" on the definition contained in the Administrative Procedure Act ("APA"), *id.* at 5, as the Sixth Circuit notes, the great weight of authority goes the other way.

> The First Circuit has ruled that an order resulting from a rulemaking proceeding is not an order under § 401(b). Each of the other Circuits that has addressed this issue, however, has either implicitly or expressly found that such an order may be an order under § 401(b).

Alltel Tennessee, Inc. v. Tennessee Pub. Serv. Comm'n, 913 F.2d 305, 308 (6th Cir.1990). Indeed, the Ninth Circuit has explicitly rejected the proposition that the APA's definition of "order" should be imported into the Communications Act, explaining that "[w]hen Congress intended the APA's definition of a given term to be incorporated into the Communications Act, it said so." *Hawaiian Tel. Co. v. Pub. Utils. Comm'n*, 827 F.2d 1264, 1271 (9th Cir.1987) (citing 47 U.S.C. §§ 409(a)-(c), which expressly incorporates the APA's definition of "adjudication"). This Court agrees that the word "order" should not be so narrowly construed, and believes that a violation of FCC regulations regarding dial-around compensation is the kind of violation that Congress intended to prescribe when it enacted sections 416(c) and 407. Moreover, defendant has not argued that violations of those provisions are inadequate to support a private suit under sections 206 and 207. Accordingly, the proposed amendments cannot be rejected as futile. And because

defendant has advanced no other basis for rejecting the amendments, the Court will grant plaintiffs' motion for leave to amend.

CONCLUSION

For the reasons described above, the Court finds that the private right of action established under sections 206 and 207 of the Communications Act includes a private right of action for violations of section 276 and its implementing regulation, 47 C.F.R. § 64.1300. Accordingly, defendant's motion to dismiss is denied. In addition, the Court grants plaintiffs' motion for leave to amend to add additional grounds for relief and denies as moot plaintiffs' motion with respect to the joinder of the PSPs. A separate Order accompanies this Memorandum Opinion.

ORDER

This matter is before the Court on defendant's motion to dismiss and plaintiffs' motion for leave to amend. Based on the pleadings, the record, and relevant case law, it is hereby

ORDERED that Defendant's Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction, or in the Alternative, for Failure to State a Claim is **DENIED**; and it is

FURTHER ORDERED that plaintiffs' Motion for Leave to Amend Complaint is **GRANTED IN PART** with respect to additional ground for relief and **DENIED AS MOOT** with respect to the joinder of plaintiffs.

SO ORDERED.

APPENDIX G

United States District Court
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A. 99-0696 ESH.
v.	*	March 28, 2003.
AT& T CORPORATION,	*	
Defendant.	*	

MEMORANDUM OPINION

HUVELLE, District Judge.

Plaintiffs have brought suit under section 206 of the Telecommunications Act of 1996, 47 U.S.C. § 206, which requires Interexchange Carriers ("IXCs") such as defendant AT&T to pay "dial-around" compensation to payphone service providers ("PSPs") for certain long distance calls originating from their payphones. Plaintiffs seek payment of dial-around compensation that they allege defendant owes the PSPs they represent. Defendant filed this motion to dismiss for lack of subject matter jurisdiction challenging plaintiffs' standing to bring suit. Defendant argues that as assignees of the PSPs, plaintiffs have suffered no injury-in-fact of their own and have no personal stake in the outcome of the litigation. Defendant also argues that even if plaintiffs have standing, the assignments are not valid under the applicable state law. Plaintiffs claim

that they have standing based on the assignments, or in the alternative, they have associational standing. Despite the fact that defendant failed to raise this jurisdictional defect during the four years that this case has been pending, the Court must agree that plaintiffs lack standing based on the assignments executed by the PSPs, and they cannot satisfy the requirements of associational standing. Therefore, defendant's motion to dismiss will be granted.

BACKGROUND

Plaintiffs APCC Services Inc.,[1] Data Net Systems, LLC, Jaroth, Inc. d/b/a Pacific Telemanagement Services, NSC Telemanagement Corp., Davel Communications Group, Inc., and Peoples Telephone Company, Inc. filed this action on behalf of more than one thousand PSPs that own and operate over 400,000 public payphones throughout the United States.[2] (First Amended Complaint ["Am. Compl."] ¶ 1.) Five of the six plaintiffs are "aggregators," or clearinghouses, created to streamline the billing and collection of dial-around compensation from IXCs.[3] Defendant is a common carrier of

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[1] Plaintiff APCC Services's parent company, the American Public Communications Council, Inc., is a non-profit corporation established to "effectively represent the interest of the public communications industry." (Def.'s Reply Ex. B.) It is the organization that represents the PSPs' interests in administrative matters before the FCC. (Def.'s Reply at 7 n. 4.) However, APPC Services, Inc. is a for-profit company.

[2] PSPs own, install, operate, manage, or maintain payphone services and facilities which enable callers to access the telephone network when away from their home or office. They recover the cost of the payphone services and facilities by receiving payment for their use from callers or from carriers. (Am.Compl.¶ 14.)

[3] This motion is directed only to the aggregator plaintiffs and not plaintiff Peoples Telephone Company, which is the only plaintiff in this case that brings this action on its own behalf. Consequently, for the purposes of this Memorandum Opinion, the term "plaintiffs" excludes Peoples Telephone

telephone calls and is subject to the compensation payment obligations mandated by section 276 of the Communication Act of 1934, as amended, 47 U.S.C. § 276. (*Id.* ¶ 10.)

Pursuant to section 276, defendant is required to compensate PSPs for completed access code and toll free calls that are made using PSPs' payphones and carried over defendant's telephone network facilities. (*Id.* ¶ 1.) PSPs contract with aggregators to facilitate the billing and payment process. Thus, in return for a fee from the PSPs, plaintiffs provide billing information to defendant's collection agent – the National Payphone Clearinghouse (NPC), collect payment from the NPC, and distribute the dial-around compensation to the PSPs they represent. (Pls.' Mem. at 5).

Plaintiffs bring this suit as assignees of the claims of the PSPs they represent. The assignments provide that each PSP "assigns, transfers and sets over to [plaintiff] for purposes of collection all rights, title and interest of the [PSP] in the [PSP's] claims, demands or causes of action for 'Dial-Around Compensation.' " (Def.'s Mem. Ex. A at 1.)[4] Each assignment also appoints plaintiffs as attorney-in-fact with the power to do all acts necessary to collect dial-around compensation, including the power to retain counsel, file lawsuits, and enter into settlements. (*Id.*) In addition, assignors agree to be bound by any final determinations in court or regulatory proceedings prosecuted by plaintiffs on the PSPs' behalf. (*Id.*) The assignments do not provide plaintiffs the right to retain or share in any proceeds of the litigation. (*Id.*)

Defendant argues that since plaintiffs sue as assignees who have not suffered any injury-in-fact of their own and have no

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Company.

[4] During discovery, plaintiffs produced nearly 1,300 identical assignments from the PSPs they represent. (Def.'s Mem. at 2 n. 2.)

personal stake in the outcome of the litigation, they do not have standing to sue and their claims should be dismissed for lack of subject matter jurisdiction. Alternatively, they argue that the assignments to plaintiff APCC Services are not valid under the applicable state law so that even if this plaintiff has standing, its claims should be dismissed. Since the Court concludes that none of the plaintiffs has standing to sue as assignees or as representatives of the PSPs, it need not address the validity of plaintiff APCC Service's assignments.

LEGAL ANALYSIS

I. Legal Standard

Defendant's motion to dismiss for lack of standing is a challenge to the Court's subject matter jurisdiction brought pursuant to Fed.R.Civ.P. 12(b)(1). "For purposes of ruling on a motion to dismiss for want of standing * * * courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The burden is on plaintiffs to establish the elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Questions regarding both constitutional and prudential requirements for standing are at issue here. Constitutional standing requirements are drawn from Article III and require plaintiffs to demonstrate "(1) a concrete and particularized actual or imminent injury (2) that is fairly traceable to Defendant's conduct (3) which a favorable court decision will redress." *Id.* at 560, 112 S.Ct. 2130. "These requirements together constitute the 'irreducible constitutional minimum' of standing, which is an 'essential and unchanging part' of Article III's case or controversy requirement." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S.

765, 771, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130).

The injury-in-fact requirement for standing is met only if the party bringing the action suffers an injury as a direct result of the challenged conduct. *Lujan*, 504 U.S. at 563, 112 S.Ct. 2130. Plaintiffs must also demonstrate that they have a concrete private interest in outcome of the suit. *Id.* at 573, 112 S.Ct. 2130. The concrete interest must be related to the injury-in-fact and consist of obtaining compensation for, or preventing, the violation of a legally protected right. *Vermont Agency*, 529 U.S. at 776, 120 S.Ct. 1858.

The prudential requirements for standing are judicially imposed limits on the exercise of federal jurisdiction. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996). These include the "general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Federal courts have adopted prudential limits on standing in order "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985).

II. Plaintiffs' Standing as Assignees

Plaintiffs are assignees of the PSPs that claim that defendant owes them dial-around compensation, and they argue that they have standing based on these assignments. Their position is that an assignment from an injured party satisfies the

constitutional standing requirement of a concrete injury traceable to defendant's conduct. Defendant challenges plaintiffs' standing relying on a recent Second Circuit case which held that where an assignment does not convey a concrete stake in the outcome of the litigation, the assignee does not "suffer an injury of a nature that would confer standing upon it under Article III of the Constitution." *Connecticut v. Physicians Health Services of Conn.*, 287 F.3d 110, 115 (2d Cir.2002) [hereinafter "*Physicians Health*"].

The Second Circuit's analysis in *Physicians Health* is persuasive and that case is indistinguishable from the instant one. In *Physicians Health*, the State of Connecticut brought suit under ERISA against an insurance company offering managed care plans to Connecticut residents. *Id.* at 112. The State asserted standing to sue as the assignee of participants in the managed care plans who had been injured by the plans' actions and who had assigned their right to seek injunctive or other equitable relief to the State. *Id.* at 113. The assignments did not, however, include the right to sue for money damages. *Id.* The Court explained that "[t]ypically, the assignee, obtaining the assignment in exchange for some consideration running from it to the assignor, replaces the assignor with respect to the claim or the portion of the claim assigned, and thus stands in the assignor's stead with respect to both injury and remedy." *Id.* at 117. In *Physicians Health*, there was no such exchange, and the assignments "d[id] not shift the loss suffered by individual enrollees from the alleged breach * * * from the individuals to the State." *Id.* at 116. As a result, the Court concluded that the assignment did not confer standing on the State.

Plaintiffs' situation is precisely the same as that of the State of Connecticut. The assignments on which plaintiffs rely for standing do not shift the loss suffered by the PSPs to the aggregators that represent them. Nor did plaintiffs obtain their assignments in exchange for consideration to the PSPs. And while the Second Circuit recognized that there are some

situations where the assignment of a claim may confer standing on an assignee who has not incurred an injury, expense or loss in exchange for the assignment, *id.*, the Court made clear that a such a " 'claim' cannot simply refer to a right to bring suit." *Id.* 118 n. 8. Since plaintiffs' assignments in this case grant only the right to sue and not a right to a remedy, plaintiffs have failed to establish standing.

In response, plaintiffs argue that they have a stake in the outcome of this litigation, even though they are not entitled to damages, because their compensation for billing and collection activities is based upon the number of payphones and telephone lines their PSPs have active in any billing quarter, and to the extent that the PSPs and the payphone industry are not profitable due to systematic under-compensation by defendant, plaintiffs' compensation is diminished and its business is threatened. (Pls.' Opp. at 7.) But the Supreme Court has made clear that the interest required to create standing must "consist of obtaining compensation for, or preventing, the violation of a legally protected right." *Vermont Agency*, 529 U.S. at 772, 120 S.Ct. 1858. "[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Id.* at 773, 120 S.Ct. 1858. Consequently, since plaintiffs' interest is "merely a byproduct" of the suit and not an interest in compensation for a violation of a legally protected right, their interest is too attenuated to give rise to a cognizable injury in fact under Article III.[5]

Plaintiffs also suggest that *Physicians Health* is inapposite because its holding is based on ERISA's limitations as to the

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[5] Plaintiffs' reliance on the practice of the FCC and defendant of using aggregators to assist in the collection of dial-around compensation to bolster a claim of standing is likewise unavailing. (*See* Pls.' Opp. at 2-8.) The business practices of the various players in a regulatory scheme do not confer Article III standing on plaintiffs nor do they serve to give the Court subject matter jurisdiction over this case.

classes of people who may file civil enforcement actions. (Pls.' Opp. at 11.) While the civil enforcement provisions of ERISA were the basis for the district court's holding, the Second Circuit did not rely on the lower court's reasoning. 287 F.3d at 115 ("We reach the same conclusion as that of the district court, that the State lacks standing to pursue this action as an assignee of the eight plan participants' right to bring an action in equity, although our reasoning differs from the district court's."). Thus, plaintiffs cannot distinguish their case from the plaintiff's situation in *Physicians Health*.

Nor can plaintiffs rely on *Vermont Agency* to save their claim. *Vermont Agency* involved a challenge to the standing of a citizen to sue on behalf of the United States government in a qui tam action brought under the False Claims Act ("FCA"). The FCA allows a private person to bring a civil action "for the person and for the United States Government * * * in the name of the Government," 31 U.S.C. § 3730(b)(1), against anyone who, inter alia, presents "a false or fraudulent claim for payment" to the government. § 3729(a). The statute also provides plaintiffs with a right to a portion of any damages recovered on behalf of the government. § 3730(d)(1).

The Supreme Court concluded that plaintiff had standing to bring suit on behalf of the government under the FCA even though he did not have a concrete private interest in the outcome of the suit that was related to the injury-in-fact. The Court found that "the United States' injury-in-fact suffice[d] to confer standing" on the plaintiff because the "FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Vermont Agency*, 529 U.S. at 773, 120 S.Ct. 1858. Notably, assignments effected by the FCA include both the right to sue and the right to the remedy – thus, assigning an interest in the suit directly related to the assignor's original injury. The Court's analysis also relied heavily on "the long tradition of *qui tam* actions in England and the American Colonies." *Id.* at 774, 120 S.Ct. 1858.

Plaintiffs read *Vermont Agency* too broadly. While the Supreme Court held that an "assignee of a claim has standing," *id.* at 773, 120 S.Ct. 1858, the case does not stand for the proposition that all assignments confer standing. Such a reading would clearly violate the constitutional requirements for standing articulated in *Lujan*. The Supreme Court found that the plaintiff in *Vermont Agency* had standing to bring suit based on three factors: (1) a statutory assignment of (2) both the right to sue and the right to a remedy, and (3) historical support for the action. None of these factors is present in this case, and thus, this case is distinguishable from *Vermont Agency*.

First, unlike a qui tam relator, plaintiffs in this case were not assigned claims pursuant to a grant of statutory authority. Second, plaintiffs do not have a concrete private interest in the outcome of this suit that is directly related to the injury that serves as the basis for the suit. Moreover, the outcome of the suit will not affect plaintiffs "in a personal and individual way," *Lujan*, 504 U.S. at 560 n. 1, 112 S.Ct. 2130, since, unlike a typical assignment, none of the remedies sought will flow to plaintiffs as assignees. *See, e.g., Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950) (assignee of licensor has standing to sue licensee for royalty payments due under license agreement and to retain payments recovered); *Hubbard v. Tod*, 171 U.S. 474, 19 S.Ct. 14, 43 L.Ed. 246 (1898) (general assignee has standing to sue in the name of debtor/assignor pursuant to Iowa statute); *I.V. Services of America v. Trustees of American Consulting Engineers Council Insurance Trust Fund*, 136 F.3d 114, 117 (2d Cir.1998) (standing where assignment included right to insurance benefits); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1153-54 (2d Cir.1993) (granting standing to qui tam plaintiff); *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425,

437 (3d Cir.1993).[6] Finally, there is no historical support for granting standing by assignment in this case.

Plaintiffs' reliance on *American Public Communications Council, Inc. v. Allnet Communication Services, Inc.*, 1993 WL 544300, at *1 (D.D.C.1993), *vacated on other grounds*, 959 F.Supp. 19 (D.D.C.1997), is also misplaced. Plaintiffs suggest that this Court "summarily rejected" an argument "identical" to that currently raised by defendant when, in fact, *Allnet* never addressed the issue of plaintiff's standing as an assignee. As here, the plaintiff in *Allnet* sued to recover dial-around compensation that defendant Allnet allegedly owed plaintiff's member PSPs. Defendant challenged plaintiff's standing to sue arguing that plaintiff's members were not entitled to dial-around compensation. *Id.*, at *1. If that were the case, the PSPs would not have had standing to assert a claim that could be assigned. Here, there is no question that the PSPs have a basis for a claim. Rather, the question is whether plaintiffs have standing to assert the PSPs' claims as assignees. That issue was simply not addressed in *Allnet*.

In short, plaintiffs, like the State of Connecticut, "do[ ] not, through th[e] assignment[s], possess the requisite interest that is or is threatened to be injured by [defendant's] conduct." 287

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[6] Plaintiffs also rely on *Paoloni v. Goldstein*, 200 F.R.D. 644 (D. Col. 2001), where the court granted standing to brokers to sue as assignees of clients who had been defrauded even though the brokers had not suffered a direct injury. While it is not clear whether the assignments included the right to retain a portion of any damages recovered, that case relies on *Feeder Line Towing Service, Inc. v. Toledo, Peoria & Western R.R. Co.*, which clearly did. 539 F.2d 1107, 1110 (7th Cir.1976) ("Prior to the filing of this action, plaintiff paid * * * the owner * * * $60,808.64 in full settlement of all claims and in return [the owner] assigned all claims it possessed for the loss sustained."). However, to the extent that the assignments in *Paoloni* did not involve the right to retain a portion of the damages, it is unconvincing and reflects a misreading of *Vermont Agency*.

F.3d at 119. Consequently, they do not have standing as assignees to bring suit for damages on behalf of the PSPs.

III. Associational Standing

Plaintiffs also argue that they would have standing, even if there were no assignments, based on the doctrine of associational standing recognized in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). (Pls.' Opp. at 18-21.)[7] The Supreme Court has articulated the requirements for associational standing as follows:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343, 97 S.Ct. 2434.

The first two *Hunt* conditions are satisfied in this case. First, there is no question that the PSPs that plaintiffs represent have standing to challenge defendant's alleged underpayment of dial-around compensation. Second, plaintiffs' sole purpose is to collect the dial-around compensation owed to the PSPs they represent--the same interest they seek to protect through this litigation. *Id.* at 343-44, 97 S.Ct. 2434. Plaintiffs cannot, however, satisfy the third prong of *Hunt*, for the money

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[7] Plaintiffs refer to this doctrine as "representational standing" (Pls.' Opp. at 18), but as is clear from *Hunt*, it is more appropriately referred to as "associational standing." 432 U.S. at 343, 97 S.Ct. 2434.

damages plaintiffs seek to collect are the kind that ordinarily require individual participation.[8]

This result is clearly mandated by D.C. Circuit precedent. First, in *Telecommunications Research & Action Center v. Allnet Communication Servs., Inc.*, 806 F.2d 1093 (D.C.Cir.1986) [hereinafter "*TRAC*"], the Circuit held that "the money damage claims TRAC seeks to advance are the kind that ordinarily require individual participation, so that TRAC may not proceed in the format it has selected." *Id.* at 1095. In *TRAC*, a non-profit association concerned with promoting fair, reasonable, and non-discriminatory rates for communications services, sued to recover money damages from a utility that allegedly overcharged its members. *Id.* at 1093-94. The Court rejected plaintiff's argument that individualized proof of damages by its members would not be required because damages could be calculated by a simple formula and concluded that plaintiff did not have standing to sue for money damages on behalf of its members. *Id.* at 1095.

Subsequently, in *Air Transp. Ass'n v. Reno*, 80 F.3d 477 (D.C. Cir. 1996), the Court held that an association lacked standing to seek an order requiring a government agency to reimburse its members for expenses they incurred where individualized proof was necessary and the members were not participating in the lawsuit. *Id.* at 483. Relying on *TRAC*, the

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[8] Since APCC Services, Inc. is not a trade association or "an organization of members who pay dues," but is a for-profit corporation that charges a fee for rendering services, defendant argues that they cannot have associational standing under *Hunt*. (*See* Def.'s Reply at 6-7.) In *Hunt*, the Supreme Court found that a state commission, which was not a "traditional voluntary membership organization," had associational standing to assert the claims of its members because it possessed "all of the indicia" of a membership organization. 432 U.S. at 342-44, 97 S.Ct. 2434. Since this Court concludes that plaintiffs fail to meet the requirements for associational standing, it need not determine whether plaintiffs are the equivalent of an association for standing purposes.

Court refused to grant associational standing where detailed and individualized proof from each airline would be needed. Thus, while the Court "acknowledge[d] that a request for monetary relief by an association does not absolutely preclude standing in all cases, the question in each case is whether the monetary relief can be awarded without 'individualized proof.' " *Id.* at 484 (emphasis in original).

As in these Circuit cases, the damage claims of the PSPs "are not common to the entire membership, nor shared by all in equal degree," and therefore, "individualized proof" will be necessary. *Warth v. Seldin*, 422 U.S. 490, 515-16, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Given the undisputed need for individualized proof, it is of no significance that plaintiffs have the necessary records or that it would foster "administrative convenience and administrative efficiency" if plaintiff aggregators were permitted to pursue claims on behalf of the PSPs. (Pls.' Opp. at 21.) A similar argument was considered and rejected by the Court in *TRAC*:

> We think we are not at liberty to break new ground in this case, and believe that the Supreme Court's reference to the need for "individualized participation" in Hunt implied something more than individual in-court testimony to establish the fact and extent of injury.

806 F.2d at 1095. *See also infra* note 9.

Confronted by this binding precedent, plaintiffs attempt to salvage their claims by relying on *United Food & Comm. Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) [hereinafter "*Brown Group*"]. (*See* Pls.' Opp. at 19-20.) Plaintiffs' reliance is, however, misplaced. In *Brown Group*, the Supreme Court addressed the prudential nature of *Hunt*'s third prong as it applied to a federal statute. It reaffirmed *Hunt*'s "suggest[ion] that an association's action for damages running solely to its

members would be barred for want of the association's standing to sue" remained the law, *id.* at 546, 116 S.Ct. 1529, but determined that "in enacting the WARN Act, Congress intended to abrogate this otherwise applicable standing limitation so as to permit the union to sue for damages running to its workers, and * * * had the constitutional authority to do so." *Id.* at 546, 116 S.Ct. 1529.[9] Thus, *Brown Group* was limited to the proposition that Congress may grant an express right to sue for damages to persons who would otherwise be barred by purely prudential standing requirements.

Obviously, there is no statute here that grants associational standing to plaintiffs nor is there any legal basis for extending *Brown Group* to cover the instant case. On the contrary, case law subsequent to *Brown Group* continues to reaffirm the D.C. Circuit's holdings in *TRAC* and *Air Transport*. *See, e.g., Pa. Psychiatric Society v. Green Spring Health Servs., Inc.*, 280 F.3d 278 (3d Cir.2002) (associational standing is improper for claims requiring a fact-intensive-individual inquiry); *The Legal Aid Society v. City of New York*, 114 F.Supp.2d 204, 213-14 (S.D.N.Y.2000); *Dallas Police Ass'n. v. City of Dallas*, 1999 WL 604850, at *2 (N.D.Tex.1999); *Chicago Journeymen Plumbers' Local Union 130, U.A. v. Personnel Bd.*, 154 L.R.R.M. (BNA) 2915, 1996 WL 288631, at *2 (N.D. Ill.1996). The decisions in *TRAC* and *Air Transport* govern this case,[10]

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[9] In addition, *Brown Group* rejected plaintiff's invitation to hold that the third prong of *Hunt* could be satisfied by a "simplified" claim for monetary relief. *Id.* at 545 n. 5, 116 S.Ct. 1529. Rather, the Court stated:

> In light of our conclusion that in the WARN Act Congress has abrogated the third prong of the associational standing test, we need not decide here whether, absent congressional action, the third prong would bar a "simplified" claim for damages.

Id. at 554, 116 S.Ct. 1529.

[10] Significantly, the Court in *Air Transport* denied rehearing and suggestion

and while it may be that the Circuit has not adopted a per se rule barring associational standing in all claims for money damages, *TRAC*, 806 F.2d at 1095, these cases clearly preclude a finding of associational standing here.

CONCLUSION

Since plaintiffs lack standing, the Court has no subject matter jurisdiction and their claims must be dismissed.[11] As a result, the complaint of the plaintiffs/assignees[12] is dismissed with prejudice. A separate Order accompanies this Memorandum Opinion.

ORDER

This matter is before the Court on defendant AT & T's Motion to Dismiss Assignee Plaintiffs' Claims. Based on the pleadings, the record, and relevant case law, it is hereby

ORDERED that defendant's motion is **GRANTED**; and it is

FURTHER ORDERED that the plaintiffs' complaint (with the exception of the complaint filed by Peoples Telephone Co., Inc.) is **DISMISSED WITH PREJUDICE**.

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for rehearing in banc on May 24, 1996, which was several weeks after *Brown Group* was decided.

[11] Plaintiffs appear to suggest that they should be permitted to amend their complaint. (Pls.' Opp. at 28 n. 4.) This is not an available option. *See, e.g., Lans v. Gateway 2000, Inc.*, 84 F.Supp.2d 112, 115 (D.D.C.1999).

[12] These plaintiffs include APCC Services Inc., Data Net Systems, LLC, Jaroth, Inc. d/b/a Pacific Management Services, NSC Telemanagement Corp., and Davel Communications Group, Inc., but not the one individual PSP – Peoples Telephone Company, Inc.

APPENDIX H

United States District Court
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A. 01-638 ESH.
v.	*	Dec. 21, 2001
WORLDCOM, INC.,	*	
Defendant.	*	

MEMORANDUM OPINION

HUVELLE, District Judge.

The central issue facing the Court is whether to stay on grounds of primary jurisdiction three related actions that are currently before it, pending referral to the Federal Communications Commission ("FCC" or the "Commission"). The three actions are *APCC Services. Inc. v. WorldCom, Inc.*, Civil No. 01-638, *APCC Services, Inc. v. Qwest Communications Corp.*, Civil No. 01-641, and *APCC Services Corp. v. Sprint Communications Company L.P.*, Civil No. 01-642. Defendants have moved to dismiss or stay pending resolution of certain central issues by the FCC.[1] Plaintiffs have opposed, and have instead moved the Court to appoint a special

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[1] Qwest has moved only to dismiss.

master pursuant to Fed.R.Civ.P. 53, as it did in a prior related action, *APCC Services v. AT & T Corp.*, Civil No. 99-696.[2] Based on a thorough consideration of the pleadings and the entire record therein, the Court finds that these actions do not require further resolution of issues within the special competence of the FCC, and therefore defendants' motions to dismiss or stay will be denied. This Memorandum Opinion constitutes the Court's ruling in all three of these actions.

BACKGROUND

I. The Payphone Industry

Plaintiffs – APCC Services, Inc. ("APCC"), Data Net Systems, L.L.C., Jaroth, Inc. d/b/a Pacific Telemanagement Services, Intera Communications Corp., and Davel Communications Corp. – are assignees and attorneys-in-fact for over 1,000 payphone service providers ("PSPs"). These plaintiffs represent more than 400,000 of the 500,000 to 600,000 payphone lines in the United States. (First Amended Complaint ¶ 1.) The three defendants – WorldCom, Inc. ("WorldCom"), Qwest Communications Corp. ("Qwest"), and Sprint Communications Company L.P. ("Sprint") – are three of the four largest interexchange telephone carriers in the United States.[3] All parties are major players in the payphone industry, a field that has recently seen a great deal of flux with respect to the proper system for billing and revenue-sharing. Plaintiffs have brought suit under 47 U.S.C. § 206, seeking unpaid compensation from defendants for all dial-around calls made

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[2] Two other related actions that had been pending before the Court – *APCC Services, Inc. v. Cable & Wireless, Inc.*, Civil No. 01-701, and *APCC Services, Inc. v. Global Crossing Telecommunications, Inc.*, Civil No. 01-710 – were both dismissed without prejudice by the plaintiffs.

[3] The fourth carrier is AT & T Corporation, which has also been sued by APCC in a related case pending before the Court.

from their telephones and carried by defendants from October 1, 1998 to the present.

There are currently about 2.4 million payphones in the United States. Most telephone calls made from payphones are either "coin calls" – in which the calling party deposits coins directly into the payphone – or "coinless calls" – such as directory assistance, operator service, access code, and subscriber 800 calls. This case involves coinless calls.

A coinless payphone call is initially received by the local exchange carrier ("LEC") that serves the payphone. The LEC then routes the call to an interexchange carrier ("IXC"), which is also known as the first facilities-based carrier. The IXC then does one of two things with the call. In most cases, it will "switch" and transmit the call to the LEC serving the call recipient, thereby "terminating" the call. In other cases, a second entity with its own switching capability will resell the first facilities-based carrier's services and perform the switching and transmission functions itself. These entities are known as facilities-based resellers ("FBRs"). PSPs own or lease the payphones, and are entitled to compensation from either the facilities-based carrier or the FBR for each completed call. *See In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Second Order on Reconsideration, 2001 WL 332794 (F.C.C.), at *5-6 (¶ 12) (Apr. 5, 2001) [hereinafter *Second Order on Reconsideration*].

All three defendants are facilities-based carriers. Sprint, for example, handles approximately 432 million payphone calls per year, transmitting an estimated 104 million of these to FBRs, and terminating the rest either on its own behalf or for resellers that lack switching capacity. Sprint currently serves approximately 110 FBRs and has direct payment relationships with over 1,300 PSPs. (Sprint Mem. at 3.) FBRs and PSPs have separate, independent payment relationships.

II. FCC Payphone Compensation Rules

This case involves a dispute between PSPs and IXCs over compensation for certain telephone calls made from plaintiffs' payphones and carried by defendants. The calls include both "dial-around" and "toll-free" calls, two types of coinless calls that are indistinguishable for compensation purposes. Both types of calls at issue are thus commonly referred to as "dial-around calls." APCC asserts that the defendants have not paid all the compensation that they owe for dial-around calls. The FCC's complex rules regarding payphone compensation are central to this case.

In 1996, Congress passed the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996), and directed the FCC to "prescribe regulations that [ ] establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1). Since then, the FCC has tried to follow Congress' direction, issuing numerous reports, orders, and clarifications relating to payphone compensation.

A. Tracking and Compensation Responsibility

In *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report & Order, 11 F.C.C.R. 20,541, 1996 WL 547458 (1996) [hereinafter *First Payphone Order*], the FCC defined a "completed" call for compensation purposes as "a call that is answered by the called party." *Id.* at 20,573 (¶ 63). This definition was affirmed by the agency as recently as November 21, 2001. *See In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Order on Reconsideration ¶ 7, 2001 WL 1477886 (Nov. 21,

2001) [hereinafter *Third Order on Reconsideration*]. The FCC also held that the first facilities-based carrier was in the best position to monitor payphone calls to completion and should therefore be responsible for compensating the PSP for all completed calls. *Id.* at 20,590 (¶ 97).

Upon reconsideration, however, the FCC determined that FBRs were also capable of tracking calls to completion. Because the FBRs were the "primary economic beneficiar[ies]" of the calls that they terminate, the agency found that they should be separately responsible for compensating the PSPs for those calls. *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 F.C.C.R. 21,233, 21,277, 1996 WL 658824 (¶ 92) (1996) [hereinafter *Order on Reconsideration*]. Facilities-based carriers remained responsible for compensating PSPs for all other completed calls. Both facilities-based carriers and FBRs were authorized to develop their own tracking and compensation systems to comply with these rules. *Id.* at 21,278 (¶ 93); *First Payphone Order*, 11 F.C.C.R. at 20,590-91 (¶¶ 96-97).

In April 2001, the FCC reaffirmed that a facilities-based carrier that terminates a payphone call is responsible for compensating the PSP. Next, the agency found that the FBR owed compensation to the PSP for a call it terminated only if the FBR had identified itself to the facilities-based carrier as responsible for paying compensation. *Bell Atlantic-Delaware, Inc. v. Frontier Communications Services, Inc.*, Mem. Op. & Order, File No. E-98-48, 2001 WL 327916, 2001 WL 327619 (F.C.C.) (Apr. 5, 2001) [hereinafter *Bell Atlantic Order*].

> The logical construction of the language from the [1998] Coding Digit Waiver Order requires a first facilities-based carrier to pay [compensation to PSPs] unless the [FBR] has

identified itself to the first facilities-based carrier as being responsible for paying compensation.

Id. ¶ *14.* The FCC also held that facilities-based carriers should identify the FBRs responsible for paying compensation upon request by a PSP. *Id.*

While the *Bell Atlantic Order* addressed retroactive and contemporaneous issues of compensation and tracking, the FCC issued a second order on the same day that dealt with the same topics prospectively. In the *Second Order on Reconsideration*, the FCC held that as of November 23, 2001, the compensation scheme set forth in the *Bell Atlantic Order* would cease to be in effect. Instead, the agency reallocated payment and tracking responsibilities to facilities-based carriers for all coinless calls. *Second Order on Reconsideration* ¶ 16. "[T]he carrier responsible for compensating [the PSP] for coinless calls is the first facilities-based interexchange carrier to which a completed coinless access code or subscriber 800 payphone call is delivered by the LEC unless another carrier comes forward and identifies itself to the PSP as the party liable for compensating the PSP." *Id.* ¶ *9.* The facilities-based carriers must then seek reimbursement from the FBRs for the calls that the FBRs terminate. *Id.* ¶ *18.*[4]

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[4] Sprint appealed these rules under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, et seq., to the United States Court of Appeals for the D.C. Circuit and simultaneously moved for a stay. Sprint contends, among other things, that the FCC failed to comply with the APA and the agency's own regulations in promulgating the rules. *See Sprint Corp. v. FCC*, No. 01-1266 (D.C. Cir. June 12, 2001). The FCC declined to stay implementation of these rules pending appeal. *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order at 2, 2001 WL 838857 (July 26, 2001).

The FCC recently affirmed these rules in the Third Order on Reconsideration.[5] In that order, the Commission "decline[d] to modify the rules as established in the *Second Order on Reconsideration*." *Third Order on Reconsideration* ¶ 2. In response to a challenge by WorldCom, the FCC affirmed its "longstanding definition of 'completed' calls to mean calls completed to the called party." *Id.* ¶ 7. Moreover, the agency reiterated that "the first IXC [must] track or arrange for tracking of each call to determine whether it is completed and therefore compensable," particularly because of the variety of options available to the carriers to perform the tracking function. *Id.* ¶ 10.

B. Per-Call Compensation

The FCC's attempts to establish payphone compensation rates since 1996 has followed a similarly tortuous path. In addition to an initial attempt at allocating responsibility for PSP compensation, the *First Payphone Order* addressed compensation rates. First, for an interim period between November 6, 1996 and October 6, 1997, the FCC ordered compensation at a flat rate of $45.85 per payphone per month. *First Payphone Order*, 11 F.C.C.R. at 20,601, 20,604 (¶¶ 119, 125). After that interim period, the FCC established a fixed rate of $0.35 to the PSP for each compensable dial-around call made from a payphone. 47 C.F.R. § 64.1300; *First Payphone Order* ¶ 51. Both rates, however, were vacated by this Circuit for lack of sufficient evidence in the administrative record. *Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 564-65 (D.C. Cir. 1997).

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[5] The *Third Order on Reconsideration* was issued on November 21, 2001, after briefing was completed on the motions currently before the Court. Regardless, none of the parties brought the FCC's ruling in the *Third Order on Reconsideration* to the attention of the Court, which is especially puzzling in light of the fact that the ruling appears to definitively resolve at least two of the issues that defendants argue should be referred to the FCC.

On remand, the FCC revised the per call rate to $0.284 for all calls made after October 6, 1997, but it did not re-establish any rate for the interim period. *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Second Report & Order, 13 F.C.C.R. 1778, 1779 (¶ 1), 1997 WL 868694 (1997) [hereinafter *Second Rate Order*]. However, that second rate was also remanded to the FCC by this Circuit for further explanation. *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998). On a second remand, the FCC retroactively adjusted the rate for calls made between October 7, 1997 and April 20, 1999 to $0.238 per call. *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report & Order & Order on Reconsideration of the Second Report & Order, 14 F.C.C.R. 2545, 2635 (¶ 196), 1999 WL 49817 (1999) [hereinafter *Third Rate Order*]. The *Third Rate Order* also established a new rate of $0.24 per call for calls made on or after April 21, 1999. *Id.* at 2552 (¶ 14). Finally, the FCC held that facilities-based carriers and FBRs could recover the overpayments made when the unlawful per month and per call rates were in effect through offsets to future compensation. The FCC did not establish a new compensation plan for the interim period, however, and therefore the offsets could not yet be recovered. *Id.* at 2636-37 (¶¶ 197-98). This Circuit affirmed the *Third Rate Order*. *American Pub. Communications Council v. FCC*, 215 F.3d 51, 58 (D.C. Cir. 2000).

The per call compensation scheme applies, however, only to payphone lines for which the LEC had implemented technology to track and record compensable calls. There are two forms of this technology – "FLEX ANI" software, which is installed on payphone lines, and "ANI ii" digits, which are "hard coded" on a payphone itself. *See In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket

No. 96-128, Mem. Op. & Order, 13 F.C.C.R. 4998, 5000 n. 8, 5009-10 (¶¶ 2, 19-20) (March 9, 1998), at ¶¶ 2 n. 8, 19 & 20, 1998 WL 99371 [hereinafter *Bureau Coding Digit Waiver Order*]. This technology allows an LEC to transmit to the carrier a numeric code that identifies calls made from a PSP's payphones. Without FLEX ANI or ANI ii technology, the facilities-based carriers cannot simultaneously track which calls are compensable. *First Payphone Order* ¶ 99. If FLEX ANI or ANI ii is not available for a given phone line, the carrier can pay a flat monthly amount for that line. *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Mem. Op. & Order, 13 F.C.C.R. 10,893, 10,901-15 (¶¶ 16-35), 1998 WL 153171 (Apr. 3, 1998) [hereinafter *Per-Phone Compensation Order*].

The FCC originally ordered LECs to implement FLEX ANI by October 7, 1997, but later extended that deadline to March 9, 1998. *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, 12 F.C.C.R. 16,387, 16,389-90, 16,391-92 (¶¶ 8-9, 17), 1997 WL 614948 (Oct. 7, 1997) [hereinafter *Bureau Waiver Order*]. The agency then extended the deadline a second time by creating a separate deadline for each payphone line served by the LEC-so that the deadline would be the date on which the LEC provided FLEX ANI for at least 25 percent of the "smart" payphones in a given "area," although LECs could also apply for extensions of the deadline up to December 31, 1998. *Bureau Coding Digit Waiver* ¶¶ 36, 71. The FCC now assumes that all LECs have implemented FLEX ANI technology on all non-ANI ii payphone lines for which compensation is billed per-call; in reality, however, the software is not in place everywhere, and even where it has been installed, there have been significant technological problems, such as the failure of the system to transmit the correct code.

For all phones with ANI technology, payment to PSPs is due by the end of the quarter following the quarter for which compensation is owed, with an 11.25 percent interest penalty for late payment. *Per-Phone Compensation Waiver Order* ¶ 3; *Third Report & Order* ¶ 189; *Bell Atlantic Order* ¶ 17 n. 43. Within thirty days after the close of each quarter, the LEC submits to each facilities-based carrier a list of all payphone numbers, or ANIs, that were valid for the quarter, and identifies the PSP that owned each ANI. *First Report and Order* ¶ 112. The carrier then uses this list to identify the amount due each PSP. *Id.* Payphones that do not transmit FLEX ANI digits are not eligible for per-call compensation.

> Once per-call compensation becomes effective, we clarify that, to be eligible for such compensation, payphones will be required to transmit specific payphone coding digits as part of their ANI, which will assist in identifying them to compensation payors. Each payphone must transmit coding digits that specifically identify it as a payphone, and not merely as a restricted line.

Order on Reconsideration ¶ 64.

In sum, the current payphone compensation regulatory structure requires that PSPs must be compensated for all calls answered by the called party. For all calls prior to November 23, 2001, the facilities-based carrier is responsible for compensating the PSP unless an FBR both terminated the call and identified itself to the carrier as the party responsible for paying compensation. For all calls on or after November 23, 2001, the first long distance carrier to which a dial-around call is switched must compensate the PSP, and thereafter seek reimbursement from any FBR to which the call is switched.[6]

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[6] The only exception to this rule occurs when a party other than the first facilities-based carrier identifies itself to the PSP as responsible for

For all calls made between October 7, 1997 and April 20, 1999, the per-call rate of compensation is $0.238; for all calls made on or after April 21, 1999, the per-call rate is $0.24. The FCC has not yet established a rate for calls made during the interim rulemaking period between November 6, 1996 and October 6, 1997, during which time PSPs had been compensated at a flat monthly rate of $45.85 per phone. Facilities-based carriers and FBRs will be able to offset any overpayments to PSPs during that period through their future compensation to the providers. And these rules assume that FLEX ANI software has been installed since 1998 to track calls in all non-ANI ii payphones that bill at a per-call rate, though as noted, this technology has not been universally implemented, and where it has been installed, it has not always worked.

III. Related Lawsuits

The payphone industry is big business, and given the complexity of the FCC compensation rules and the slow pace at which they have been implemented, it is not surprising that several suits brought by PSPs against carriers are now pending in federal courts across the country. In five of these actions, defendants moved to dismiss or stay pending referral to the FCC. In three of these cases, courts issued stays pending referral; in the other two, they did not.

A. The Utah Action

On October 1, 1999, two PSPs filed suit against Sprint in the United States District Court for the District of Utah, alleging that Sprint failed to provide adequate compensation for coinless payphone calls. *Flying J, Inc. v. Sprint Communications Co. L.P.*, Civil No. 1:99-CV-111-ST (D. Utah). On January 10,

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compensation; in that case, the party identifying itself must pay the PSP directly.

2000, the court referred four issues to the FCC on primary jurisdiction grounds – "1) [t]he FBR issues; 2) [t]he retroactive adjustment or true up; 3) [t]he overpayment for calls set-off; and 4) [i]nterim payments issues." *Id.* at 13. The court found that "resolution of these issues requires the FCC's expertise and familiarity with the industry; these issues are unique to the regulated communications industry, these are issues for which uniformity is important for the regulation of the business entrusted to the FCC and for which a decision by the FCC would be helpful to this litigation." *Id.* at 10. At the same time, however, the court ordered discovery to proceed in spite of the referral. *Id.*

Referral proceedings were initiated at the FCC in March 2000 when the agency issued a public notice inviting comment on the referred issues. Sprint, APCC, and other interested parties filed comments, many of which are still under consideration by the FCC nearly two years after referral.

B. The Virginia Action

APCC brought an action similar to the case at hand against VoCall Communications Corp. in the Eastern District of Virginia, and defendant moved to dismiss or stay pending referral to the FCC. On February 25, 2000, the court deferred decision on defendant's motion pending further briefing, and allowed discovery to continue in the interim. (Pl. Opp. Ex. 4.) The court never needed to rule on the motion, however, because the case settled and was dismissed with prejudice by stipulation of the parties on May 9, 2000.

C. The AT & T Action

This Court was the next to address the primary jurisdiction issue. On March 19, 1999, the plaintiffs involved in the present cases filed suit against AT & T for full compensation from dial-around calls. AT & T moved to dismiss or stay pending

referral to the FCC, which the Court denied on March 9, 2000. The Court held that "at least as to the majority of this case, this is not something [where] the primary jurisdiction of the FCC should be invoked. I believe that a large portion of this case is factual. It is not subject to conflict with any ruling by any other court or by the FCC." *APCC Servs., Inc. v. AT & T Corp.*, Civil No. 99-696, at 16 (March 9, 2000) [hereinafter *AT & T Transcript*]. On May 18, 2001, this Court referred the AT & T action to a special master for discovery, which is currently proceeding.

D. The Pennsylvania Action

On December 14, 1998, Phone-Tel Communications ("Phone-Tel"), a PSP, filed a putative class action on behalf of all PSPs nationwide (excluding only those PSPs that were LECs) against Sprint, AT & T, and WorldCom in the Eastern District of Pennsylvania. As in the instant action, plaintiffs in the Pennsylvania case sought payment from the facilities-based carriers for all completed payphone calls. Defendants moved to dismiss or stay on primary jurisdiction grounds.

On June 12, 2000, in a thoughtful and thorough opinion, the court stayed the action and referred four issues to the FCC: 1) the scope of the definition of a "completed" call; 2) creation of a per call compensation rate for the interim period between November 7, 1996 and October 6, 1997; 3) a determination of who must compensate a PSP for calls that are initially carried by a first facilities-based carrier but are subsequently terminated by an FBR; and 4) the effect of LECs' failure to implement FLEX-ANI software in accordance with FCC deadlines. *Phone-Tel Communications, Inc. v. AT & T Corp.*, 100 F. Supp. 2d 313, 322 (E.D. Pa.2000). The court found that these issues were "within the special competence of an administrative agency" and that the court was therefore "require[d] to refer the matter to the [ ] agency." *Id.* at 321 (internal quotations omitted).

The FCC's response to the referral, however, has been limited. On June 27, 2001-more than one year after the court's opinion-the agency convened a conference, instructing the parties to begin exchanging information in order to identify and narrow the scope of the proceeding. To date, it appears that no further action has been taken.

E. The Arizona Action

The most recent court to address these issues was the District of Arizona. *In GCB Communications, Inc. v. WorldCom, Inc.*, No. CIV-00-1216-PHX-SMM, the plaintiff PSPs brought suit under 47 U.S.C. § 206 to collect compensation for all completed dial-around calls. Defendant moved to dismiss or stay pending referral to the FCC for resolution of key issues. On July 10, 2001, the court granted defendant's motion, and stayed the action pending a decision by the agency on

> (1) creation of a per call compensation rate for the period November 7, 1996 to October 6, 1997; (2) the effect of LECs' failure to implement FLEX-ANI technology; (3) the impact this failure has on the ability of an IXC to determine whether a call made from a payphone has actually been "completed" as defined by the FCC; and (4) what constitutes an act of an FBR identifying itself to an IXC for dial-around compensation purposes.

GCB Communications, Inc. v. WorldCom, Inc., No. CIV-00-1216-PHX-SMM, Order (Jul. 10, 2001), at 17-18. The Arizona court elected not to proceed with discovery until resolution of those issues by the FCC, and to date, no further action has been taken.

IV. History of These Actions

Plaintiffs filed these three cases on March 23, 2001, under 47 U.S.C. § 206, but have since amended the complaints in response to three arguments raised by defendants in their motions to dismiss or stay. First, in the original complaints, plaintiffs sought compensation for "every compensable call carried by [defendants] from October 7, 1997 * * * to present." (Complaint, Count I, ¶ c.) However, section 415(b) of the Communications Act imposes a two-year statute of limitations on claims brought under 47 U.S.C. § 206. Therefore, only claims accruing after March 23, 1999 are timely. Defendants' obligation to compensate plaintiffs for dial-around calls is quarterly, and arises on the first day of the annual quarter that is one quarter after the one in which those calls were made (*e.g.*, calls made in the first quarter of 1999 became due on the first day of the third quarter of 1999). *See In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, 13 F.C.C.R. 7303, 7305 (¶ 4), 1998 WL 166135 (Apr. 10, 1998). Compensation for calls made during the fourth quarter of 1998-from October 1 to December 31-was due on April 1, 1999, and are therefore the first series of calls that fall within the two-year statute of limitations. Plaintiffs have amended their complaints to reflect this, and now seek compensation only for calls after October 1, 1998.

Second, plaintiffs' original complaint improperly sought compensation for calls before April 20, 1999 at the now-vacated rate of $0.284 per call. (Complaint ¶ 20; Count I, ¶ c.) The amended complaint properly seeks compensation at the new rate of $0.238 per call.

Third, Count II of plaintiffs' original complaints sought an order for defendants

> to provide Plaintiffs for each calendar quarter since 3Q98 a computer-readable list of the toll-free (*e.g.*, 800) numbers which traversed [defendants'] network[s] upon which [defendants] did not pay per-call dial around compensation, the volume of calls for each toll-free number, and for each of these toll-free numbers upon which [defendants] did not pay per-call dial around compensation, the name, address, contact person and phone number of the carrier to which all traffic for that toll-free number was routed by [defendants].

(Complaint, Count II, ¶ b.) In response to defendants' argument that no legal basis exists for this count-because no statute, regulation, or FCC order requires defendants to provide this information-plaintiffs have deleted Count II from their amended complaints.[7]

LEGAL ANALYSIS

Defendants raise three arguments in support of their motion to dismiss. First, Qwest contends that plaintiffs' actions should be dismissed because plaintiffs have not exhausted their administrative remedies prior to bringing suit. Second, defendants-led by Sprint-argue that Count I of the complaint fails to state a claim for relief to the extent that it seeks compensation from defendants for calls transferred to FBRs. Finally, defendants argue for dismissal or a stay on grounds of primary jurisdiction.

I. Exhaustion of Administrative Remedies

Section 207 of the Communications Act provides that

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[7] To the extent that defendants moved to dismiss the complaint based on statute of limitations grounds, plaintiffs' use of an invalid per-call rate, or failure to state a claim, these arguments have been rendered moot by plaintiffs' amended complaint.

> [a]ny person claiming to be damaged by any common carrier * * * may either make complaint to the Commission * * * or may bring suit for the recovery of damages for which such common carrier may be liable * * * in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207. As the plain language of the statute makes clear, the two avenues of legal recourse are mutually exclusive-a party may seek damages from a common carrier, such as defendants, either before the FCC or in federal court, but not in both. *See Frontier Communications of Mt. Pulaski, Inc. v. AT & T Corp.*, 957 F.Supp. 170, 174-75 (C.D. Ill. 1997). As noted, the Communications Act also contains a two-year statute of limitations clause. "All complaints against carriers for the recovery of damages * * * shall be filed with the Commission within two years from the time the cause of action accrues * * *." 47 U.S.C. § 415(b). Although the language of section 415(b) expressly refers only to complaints before the FCC, courts have consistently held that this statute of limitations applies equally to actions in district court. *See, e.g., Compuwill Express, Inc. v. ATX Telecomm. Servs., Ltd.*, 2000 WL 694780, at *10-11 (E.D. Pa. 2000); *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F.Supp.2d 565, 582 (S.D.N.Y. 1999).

Qwest argues that this interpretation of section 415(b) as applying to claims brought both before the FCC and in federal court should also encompass paragraph 114 of the *First Payphone Order*. That section provides:

> [F]or purposes of bringing a complaint before the Commission concerning a carrier's payment of payphone compensation, the time period for the statute of limitations does not begin to run until after the carrier-payor considers a compensation claim and issues a denial of that claim.

First Payphone Order ¶ 114. Thus, the FCC rules require any party that wishes to file a complaint against a common carrier with the Commission to first submit a claim to that carrier, and to wait until the carrier denies the claim before bringing suit. This principle was affirmed in the Order on Reconsideration. *Id. ¶ 113.* Qwest contends that this rule-that a payphone compensation claim does not accrue until 1) the PSP presents it to the long distance carrier, and 2) the carrier denies the claim-applies to all actions brought under section 207, whether the action is brought before the FCC or in federal court. Because plaintiffs have not submitted any such claim to Qwest, defendant argues that "APCC's lawsuit is unripe, and fails to state a valid claim."[8] (Qwest Mem. at 13.)

According to Qwest, this argument is grounded in both law and policy. Legally, Qwest asserts that permitting plaintiffs to bring suit in federal court without meeting the prerequisites set out by the FCC for complaints before the Commission would be tantamount to "adopt[ing] the conclusion that a cause of action for payphone compensation at the FCC would be different than a cause of action for payphone compensation in this Court." (Qwest Reply at 4 (emphasis omitted).) Qwest contends, without providing any legal support, that this proposition "has been rejected by every court that has addressed accruals of causes of action at the FCC and in court." (*Id.*) Rather, Qwest's support for this claim that "rules which define accrual of claims at the FCC apply equally to claims in district courts" is limited to cases holding that the Telecommunications Act's statute of limitations applies to cases brought both before the FCC and in federal court, even though the wording of the statute is limited to claims brought before the Commission. (*Id.* at 5.) But Qwest's argument misses the distinction between limitations

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[8] The same legal analysis applies whether this argument is characterized as one based on ripeness, the failure to state a valid claim, or exhaustion of administrative remedies.

imposed on federal jurisdiction by Congress, which are permissible, and those imposed by an administrative agency, which are not. For example, in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994), the Supreme Court held that

> we shall find that Congress has allocated initial review to an administrative body where such intent is "fairly discernible in the statutory scheme." Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review.

Thunder Basin, 510 U.S. at 207, 114 S.Ct. 771 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 351, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984)) (internal citations omitted). Under Qwest's argument, initial review of a party's claim against a carrier would be ceded in the first instance to the carrier itself, despite the plain language of section 207, which allows a plaintiff to choose to bring a claim either before the FCC or in federal court. While the FCC may impose prerequisites to the filing of an administrative claim, it may only establish such barriers to federal court jurisdiction when directed by federal statute.[9] In this case, the Communications Act explicitly vests original jurisdiction in the federal courts. The FCC's rule requiring a filing of a claim with a carrier before

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[9] To this extent, the cases cited by Qwest are inapposite. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997), involved a statutory prerequisite to filing a lawsuit. *Id.* at 197, 202, 118 S.Ct. 542. *Recchion ex rel. Westinghouse Electric Corp. v. Kirby*, 637 F.Supp. 1309 (W.D. Pa.1986), addresses Fed R. Civ. P. 23.1, which imposes a demand requirement prior to a shareholder derivative suit. *Id.* at 1318. These cases have nothing to do with administrative law, or with Qwest's argument that an agency could impose administrative prerequisites or in any way restrict federal jurisdiction in the absence of the direction of Congress to do so.

bringing an action must therefore be limited to those claims that are brought before the Commission.[10]

II. Compensation for Calls Transferred to FBRs

Defendants next argue that plaintiffs' complaints fail to state a viable claim for relief to the extent that they seek compensation from defendants for calls transferred to FBRs. Plaintiffs request payment "for each and every compensable call carried by" defendants "from each and every payphone" of the plaintiffs "from October 1, 1998 * * * to [the] present * * *." (First Amended Complaint, Count I, ¶ c.)

As noted, the FCC clarified the relative compensation burdens for facilities-based carriers and FBRs. The *Second Order on Reconsideration* confirmed that "the logical construction of the language of the *Coding Digit Waiver Order* requires a first facilities-based carrier to pay [the PSP] unless the reseller has identified itself to the first facilities-based carrier as being responsible for paying compensation." *Id.* ¶ 7 (quoting *Bell Atlantic Order* ¶ 14.)[11] Thus, for all time periods

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[10] Qwest's policy arguments are similarly unavailing. Defendant contends that requiring PSPs to first submit claims to the carriers themselves is consistent with the Commission's mandate regarding the 1998 verifications that the parties "work together to reconcile or explain" any disputes. First Payphone Order ¶ 101. However, the documentation for certifying compensation payments to PSPs to which the FCC referred in this Order has never been filed by the carriers as a result of a delay imposed by the Commission. In the absence of this information, filing a claim with the carriers would likely be a futile exercise.

[11] The issue in *Bell Atlantic* was on what basis a first facilities-based carrier was excused from compensating the PSP for calls switched to an FBR. Complainants asserted that a carrier was liable for all calls except those for which the FBR identified itself as responsible to the PSP. Defendants contended that the carrier was responsible for all calls except those for which the FBR identified itself as responsible to the first facilities-based carrier. The FCC unambiguously chose the latter interpretation. *Bell Atlantic Order*

relevant to the complaint, the Commission has unequivocally held that first facilities-based carriers must compensate PSPs unless an FBR has identified itself to the carrier as the party who is responsible for payment. This is the interpretation of the FCC orders that plaintiffs offer (Pl. Opp. to Qwest at 15-16), and it is the correct construction of the rules. The Court will therefore read plaintiffs' complaint to be consistent with this interpretation, and finds that plaintiffs' use of the phrase "each and every compensable call carried by defendant[s]" is limited to compensation for calls except those for which an FBR identified itself to defendants as responsible for payment. (First Amended Complaint, Count I, ¶ c.) Under the Commission's rules, plaintiffs have no claim for compensation from defendants for any other calls, and therefore to the extent that plaintiffs seek additional payments, any claim for these payments will be dismissed.

III. Primary Jurisdiction

Defendants next contend that the Court should refer this case to the FCC for resolution of technical issues that are within the expertise of the Commission. Under the doctrine of primary jurisdiction, courts may refer issues to an agency for its expert consideration and to help ensure elucidation and enforcement of federal regulatory requirements. *Allnet Communication Serv., Inc. v. National Exch. Carrier Ass'n*, 965 F.2d 1118, 1120 (D.C. Cir. 1992). As the Supreme Court explained,

> The doctrine of primary jurisdiction * * * is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties* * *. Primary jurisdiction * * * applies where a claim

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¶ 14.

> is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires a resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pacific Railroad Co., 352 U.S. 59, 63-64, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956).

Courts traditionally examine four factors in considering a referral motion: (1) whether the issue is within the conventional expertise of judges; (2) whether the issue lies within the agency's discretion or requires the exercise of agency expertise; (3) whether there is a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made. *Total Telecomms. Servs., Inc. v. AT & T Co.*, 919 F. Supp. 472, 478 (D.D.C. 1996).

This doctrine should, however, be invoked sparingly. *U.S. v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir.1984). The parties' interest in a swift resolution of their dispute must be balanced against those factors that might favor deferral.

> The courts should be reluctant to invoke the doctrine of primary jurisdiction, which often, but not always, results in added expense and delay to the litigants where the nature of the action deems the application of the doctrine inappropriate* * *. [W]hen the agency's position is sufficiently clear or nontechnical or when the issue is peripheral to the main litigation, courts should be very reluctant to refer* * *. Finally, the court must always balance the benefits of seeking the agency's aid with the need to resolve disputes fairly yet as expeditiously as possible.

Mississippi Power & Light Co. v. United Gas Pipeline Co., 532 F.2d 412, 418-19 (5th Cir. 1976). "Only if the FCC is better equipped 'by specialization, by insight gained through experience, and by more flexible procedure' to determine the lawfulness of the challenged practice, should this Court refer the matter to the FCC." *State of Vermont v. Oncor Communications, Inc.*, 166 F.R.D. 313, 320 (D. Vt. 1996) (quoting *Far East Conference v. United States*, 342 U.S. 570, 575, 72 S.Ct. 492, 96 L.Ed. 576 (1952)).

In arguing the issue of primary jurisdiction, the parties often rely on conclusory statements and sweeping generalizations. Defendants, in particular, have mentioned a host of issues that they assume will arise during the course of this litigation.[12] However, there is little attempt to analyze these issues under

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[12] Sprint contends that for each disputed call, the Court or the FCC must resolve: 1) whether the call was a payphone call; 2) whether the call was separately transferred to an FBR that is separately responsible for compensation; 3) whether the call was "completed" under FCC rules; 4) whether compensation has been paid for the call; 5) if so, whether the proper rate was used, or an offset is required once the FCC issues a compensation rate for the interim period; 6) whether the call was coded with the proper FLEX ANI digits; 7) whether the call was "answered" by the called party, or deemed "answered" by a proxy; and 8) whether the call was routed to a reseller, and if so, the criteria used to determine whether that reseller is one with "switching" capacities (i.e., an FBR). (Sprint Mem. at 18-19.) Qwest, on the other hand, has provided a chart of 21 legal and factual issues that it claims are part of these actions. This chart is of little or no value to the Court, since the questions raised there are either straightforward legal issues or issues that will be resolved based on factual discovery. Qwest makes no effort to analyze any of these issues under the four-factor test. Moreover, many of the issues are typical legal questions that courts frequently confront, or factual issues that will be determined through discovery-for example, "which dial-around calls from APCC's payphones were sent to Qwest's network," "which LEC provided the local phone service for each payphone," or "are any of APCC's claims barred by the two-year statute of limitations." (Qwest Mem. at 15-16.) In any event, Qwest's list seems to be shrinking; in its reply, Qwest has revised its list to include only five issues that it asserts remain unresolved by the FCC. (Qwest Reply at 9.)

the four-factor primary jurisdiction test. Defendants also appear to take for granted the threshold question-whether a resolution of these "technical" issues is necessary for this Court to proceed with these actions.

A. Potential Issues for Referral

Since the Court is unpersuaded by the laundry list provided by defendants, it will limit itself to the issues referred to the FCC by the courts that have grappled with this issue in Pennsylvania and Arizona. These courts focused on only four issues: 1) the absence of a rate for the interim period; 2) the responsibility of FBRs to compensate PSPs for certain calls; 3) the interpretation of the FCC's order requiring implementation of FLEX-ANI technology-including the question of who bears the risk for an LEC's inability to install FLEX ANI; and 4) interpretation of the FCC's order defining a "completed" call.[13]

1. Absence of Rate

Sprint argues that this action should not proceed until the FCC has determined the rate of compensation for the interim period from November 7, 1996 to October 6, 1997. The Pennsylvania and Arizona courts both agreed, and stayed cases pending a ruling by the FCC on this issue. In the Pennsylvania action, however, plaintiff's lawsuit encompassed the interim period, which is not the case here, for APCC seeks compensation for phone calls made only on or after October 1, 1998. Accordingly, the analysis of the Pennsylvania court is not relevant to the instant action.

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[13] It is also important that the Court address these issues because one of the factors used to analyze whether primary jurisdiction applies is the risk of inconsistent rulings. *Total Telcomms. Servs.*, 919 F.Supp. at 478.

As in this case, plaintiffs in Arizona did not seek compensation for calls made during the interim period. The court, however, noted that outstanding payments from IXCs to PSPs during the interim period were tied to overpayments made over the timeframe covered by the lawsuit, for which the defendant may have overpaid PSPs for some calls based on the FCC's vacated rates of $0.35 and $0.284 per call, rather than under the approved rate of $0.238 per call. In the *Third Report and Order*, the FCC held that

> IXCs may recover their overpayments to the PSPs at the same time as the PSPs receive payments from the IXCs for the Interim Period. In other words, when an IXC calculates the amount owed to each PSP for the Interim Period, it should deduct from that amount any overpayment that it made to that PSP* * *. In the event that the amount the IXC overpaid is larger than the amount it owes to the PSP for the Interim Period, the IXC may deduct the remaining overpayment from future payments to the PSPs.

Id. ¶ 198. The Arizona court focused on the provision that permits the carrier to deduct any remaining overpayment from "future payments to the PSPs," and held that "before the Court can determine what amount, if any, Defendant owes Plaintiffs, it must determine whether Defendant is entitled to deductions for overpayments that exceed the amount owed Plaintiffs for the Interim Period. This determination cannot be made until the rate for the Interim Period is established." *GCB Communications* at 7. The Arizona court therefore referred the determination of a rate for the Interim Period to the FCC.

This Court respectfully disagrees. First, the *Third Report and Order* limited the offset to any "future" compensation received after implementation of the $0.24 per call rate on April 21, 1999. *Third Report and Order* ¶¶ 14, 198. The lack of a rate for the Interim Period is therefore irrelevant to a determination of plaintiffs' claims for calls made prior to that

date. Second, the *Third Report and Order* did not specify which "future payments to PSPs" may be offset by any outstanding overpayments by the carriers, and the FCC gave no reason to confine the potential offset to the period covered by plaintiffs' complaint. Moreover, the FCC had not issued an order setting forth a rate for the Interim Period as of either March 23, 2001 – the date plaintiffs filed this action – or July 1, 2001 – the date that payment became due for all calls covered by the complaint. As a result, the calls covered by this action are not "future payments" to be offset once the rate for the Interim Period has been established, but are past payments beyond the scope of that provision of the *Third Report and Order*.[14] The FCC's determination of a rate for that period is therefore not relevant to the outcome of this case.

2. Issues Requiring Interpretation of FCC Orders

The Arizona and Pennsylvania courts referred three other issues, finding that resolution of each of these issues would require interpretation of FCC orders. The Supreme Court has set forth the standard for determining whether agency orders should be interpreted by the agency that issued them or by a court. "When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law." *Great Northern Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285, 291, 42 S.Ct. 477, 66 L.Ed. 943 (1922). However, where words are used in a "peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that the 'inquiry is essentially one of fact and of discretion in technical matters,' then the issue [ ] must first go to the [administrative agency]."

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[14] This is the most logical interpretation of the FCC's order. The Court infers that the agency cannot possibly have intended to put all carrier payments to PSPs on hold until it determined the rate for the Interim Period, because it has been nearly four-and-one-half years since this Circuit vacated the initial rate, and nearly three years since the issuance of the *Third Report and Order*.

Western Pacific, 352 U.S. at 66, 77 S.Ct. 161 (quoting *Great Northern*, 259 U.S. at 291, 42 S.Ct. 477).

a. Responsibility of FBRs for Compensation of Certain Calls

Defendants suggest that there are lingering and unresolved issues regarding the responsibility of FBRs, rather than defendants, to compensate plaintiffs for some of the dial-around calls at issue. The FCC has established a clear division of responsibility between IXCs and FBRs for compensating PSPs. In the *Bell Atlantic Order*, the agency found that for calls prior to November 23, 2001, the FBR owed compensation to the PSP for a call it terminated only if the FBR had identified itself to the facilities-based carrier as the party responsible for payment. *Id.* ¶ 14. For calls on or after that date, the agency held that "the carrier responsible for compensating the PSP for such calls is the first facilities-based interexchange carrier to which a completed coinless access code or subscriber 800 payphone call is delivered by the LEC unless another carrier comes forward and identifies itself to the PSP as the party liable for compensating the PSP." *Second Order on Reconsideration* ¶ 9.[15] The opinion in the Pennsylvania action was issued before these two FCC orders, and therefore that court's rationale for referring this matter to the FCC has been mooted.[16]

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[15] Only the *Bell Atlantic Order* applies to the three actions now before the Court, since plaintiffs are seeking payment for the period prior to November 23, 2001.

[16] The Pennsylvania court found that the FCC needed to determine "which of the carriers (the FBR or the IXC) is to compensate a PSP where one carrier with switching capabilities (the FBR) purchases long distance services from another carrier also with its own switching capabilities (the IXC) * * *." *Phone-Tel*, 100 F.Supp.2d at 319.

However, the Arizona court – ruling after the *Bell Atlantic Order* and the *Second Order on Reconsideration* – raised two concerns that led it to refer FBR-payment issues to the FCC. First, although acknowledging that the *Second Order on Reconsideration* was not currently relevant to the litigation, the court held that

> [t]o the extent the other issues this Court is referring to the FCC are not resolved prior to the time that the *Second Order on Reconsideration* applies to Defendant, however, it may very well become relevant to this litigation. The Court therefore notes that the *Second Order on Reconsideration* as it currently stands appears to be clear and unambiguous* * *. However, should the *Second Order on Reconsideration* become relevant to this litigation, and should the FCC take additional actions regarding the prospective period that raise new issues best resolved in the first instance by that agency, this Court may find it necessary to refer this part of the FBR issue to the FCC * * *.

GCB Communications at 13-14. Here, defendants do not assert that an interpretation of the *Second Order on Reconsideration* will become relevant to the action, and even assuming that it may, the Court agrees with the Arizona court that the FCC's ruling was "clear and unambiguous" with regard to the payment procedure for calls that are switched to FBRs. Since the *Second Order on Reconsideration* has yet to become relevant-and may well never become relevant-the Court must presume that the agency's position is final. Indeed, the FCC affirmed that order in the *Third Order on Reconsideration*, which "decline[d] to modify the rules as established in the *Second Order on Reconsideration*." *Third Order on Reconsideration* ¶ 2. *See Association of Int'l Automobile Manufacturers, Inc. v. Massachusetts Dept. of Environmental Protection*, 196 F.3d 302, 305 (1st Cir. 1999) ("the doctrine [of primary jurisdiction] compels us to defer our decision until a final [agency] position

has been established"). The Court therefore finds that both the *Second Order on Reconsideration* and the *Third Order on Reconsideration* are sufficiently clear with regard to the FBR issue and that referral to the FCC is not needed.

The Arizona court also referred one question to the FCC regarding the retrospective application of the *Bell Atlantic Order*. In that order, the agency held that the first facilities-based carrier must pay the PSP "unless the [FBR] has identified itself to the first facilities-based carrier as being responsible for paying compensation." *Id.* ¶ 14. The Arizona court found that "without a more concrete definition of what actions the FCC intends to construe as an FBR identifying itself to an IXC for dial-around compensation purposes, the problem of both IXCs and FBRs independently denying any obligation to compensate will continue." *GCB Communications* at 15. This Court disagrees. First, defining the phrase "identifying itself" will merely require the Court to construe those words according to their "ordinary meaning." *Great Northern*, 259 U.S. at 291, 42 S.Ct. 477. There is no suggestion from the *Bell Atlantic Order* that the words are used in a "peculiar or technical sense, and [that] extrinsic evidence is necessary to determine the[ ] meaning or proper application * * *." *Western Pacific*, 352 U.S. at 66, 77 S.Ct. 161. The matter is therefore properly left to the interpretation of this Court. Second, to the extent that the *Second Order on Reconsideration* was intended to clarify the *Bell Atlantic Order* and establish a more equitable system of compensation, as defendants suggest, the *Second Order on Reconsideration* relies on the same phrase – "identifies itself" in defining the compensation obligations of the parties. "[We clarify * * * that the carrier responsible for compensating the PSP for such calls is the first facilities-based interexchange carrier to which a completed [dial-around] call is delivered by the LEC unless another carrier comes forward and identifies itself to the PSP as the party liable for compensating the PSP."

Second Order on Reconsideration ¶ 9.[17] Given the chance to clarify the phrase, the FCC elected not to, using the same phrase in its prospective rule issued that same day. The FCC then declined to modify the definition again in the *Third Order on Reconsideration*, which specifically addressed issues in the *Second Order on Reconsideration*. There is no indication that interpreting this phrase requires any technical expertise, or that the FCC needs to offer additional guidance on the subject. Therefore, there is no reason to refer the question back to the agency.

b. Implementation of FLEX ANI Technology

The next issue referred to the FCC by the other courts was the interpretation of the FCC's order requiring implementation of FLEX-ANI technology, including the question of who bears the risk for an LEC's inability to install FLEX ANI – the PSP, the carrier, or the LEC itself. The Pennsylvania court found that

> [e]stablishing defendants' obligation to compensate plaintiff where defendants are unable to determine whether a call originates from a payphone requires an interpretation of the FCC's order instructing LECs to implement FLEX ANI technology. In turn, interpreting the FCC's order requiring implementation of FLEX ANI technology presents the issue of which party, the PSP or the IXC, should bear the risk of

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[17] As noted, the critical dispute that was decided by the Second Order and the Bell Atlantic Order-albeit with different outcomes prospectively and retrospectively-was under what circumstances the FBR became obligated to pay-by identifying itself to the IXC or to the PSP. *Bell Atlantic Order* ¶ 14. There is no indication that the question of what constituted an FBR "identifying itself" was ever in dispute, and in fact, the wording of the Orders implies that the FCC believed that the plain meaning of the phrase was the correct interpretation.

> non-payment for the LEC's inability to implement FLEX ANI technology* * *. The choice between these and perhaps even other alternatives requires the exercise of "discretion in technical matters," and a policy judgment based upon the relative competitive positions of each entity within the telecommunications industry. The choice also requires knowledge of which alternative would cause the least amount of disruption to the telecommunications industry.

Phone-Tel, 100 F.Supp.2d at 318-19 (quoting *Great Northern*, 259 U.S. at 291, 42 S.Ct. 477) (internal citations omitted). Based on these concerns-and the fact that the FCC was considering public comment on how to handle problems caused by LECs' failure to implement FLEX ANI technology-the Pennsylvania court referred this issue to the FCC.[18]

This Court, however, will decline to refer the FLEX ANI issue to the FCC for three reasons. First, to stay this action pending referral will inevitably cause even further delay in the PSPs' efforts to collect payment for dial-around calls made from their payphones. This contradicts the explicit statements of the FCC in its orders regarding implementation of FLEX ANI software. "The immediate implementation of this order is crucial to the Commission's efforts to ensure fair compensation for all PSPs, encourage the deployment of payphones, and enhance competition among PSPs, as mandated by Section 276." *Bureau Coding Digit Waiver Order* ¶ 5; *Per-Phone Compensation Order* ¶ 4 (emphasis added). "We find it is in the public interest to * * * allow IXCs to pay per-phone compensation where payphone-specific coding digits are unavailable from a payphone, so that there is no further delay in the payment of payphone compensation." *Id.* ¶ 17

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[18] The Arizona court found the reasoning of *Phone-Tel* persuasive and also referred the question to the FCC. *GCB Communications* at 9.

(emphasis added). "[T]he Commission's payphone compensation rules [ ] are designed, first and foremost, to ensure that the responsible carriers compensate PSPs for all completed calls." *Third Order on Reconsideration* ¶ 12. Staying this action pending referral of the FLEX ANI issue to the FCC would therefore contradict the agency's mandate that PSPs be compensated as quickly as possible. It is also quite clear from the above passages that the FCC has determined that IXCs, rather than PSPs, should "bear the risk of non-payment for the LECs inability to implement FLEX ANI technology." *Phone-Tel*, 100 F.Supp.2d at 318. Finally, effectuation of the statutory purpose of 47 U.S.C. § 276, as interpreted by the FCC, counsels against referring this matter to the FCC. *See Western Pacific*, 352 U.S. at 65, 77 S.Ct. 161.[19]

Second, it is not necessary to determine how to compensate the PSPs for calls made from payphones without FLEX ANI or with software that was not working properly, until the parties have identified how many of these phone calls were made during the relevant period. Plaintiffs retain the burden of proving that uncompensated phone calls exist before the proper rate need be determined. As counsel for plaintiffs noted in the *AT & T* case, "[t]he question was never whether [the IXCs] could identify them. The question is which technology they opt to use to track them as part of their independent determination as to how to go forward. So those numbers are there." *AT & T Transcript*, at 14. Once the parties complete the substantial task of determining the number of outstanding phone calls, then the FLEX ANI issue may become relevant.[20]

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[19] The Court is also hard-pressed to believe that plaintiffs should bear the burden of a delay in receiving compensation that is the result of the failure of other parties to implement technology, such as FLEX ANI, that those entities volunteered to use.

[20] Given the extensive discovery that is likely to occur in the three cases before this Court, it is possible that any conceivable issue that may ultimately

Third, the FCC has already provided detailed guidelines for compensating PSPs for calls made from payphones without FLEX ANI technology.

> Pursuant to the waiver we grant herein, beginning October 7, 1997, IXCs must either pay per-call, or per-phone compensation as described below, for payphones that do not provide payphone-specific coding digits* * *. IXCs who choose to pay per-phone compensation pursuant to the waiver granted herein, must use payphone call volume information that is already available to them to determine the call volumes for when a payphone should be compensated when payphone-specific coding digits are not available for a specific payphone. An IXC may choose to compensate those payphones that are not capable of providing payphone-specific coding digits on a per-call basis where the IXC maintains a per-call tracking mechanism * * *. We note that the default rate established in the Second Report and Order, $0.284, which terminates at the conclusion of per-call compensation-October 7, 1999-will continue to remain in effect as a default compensation rate * * * for calls originated from those payphones that are not able to provide payphone-specific coding digits.[21]

Per-Call Compensation Order ¶ 18. The *Per-Call Compensation Order* then sets forth detailed methodology for how IXCs should compensate PSPs for calls made from phones without FLEX ANI technology. *Id.* at 10,904-13 (¶¶ 21-32). Given the establishment of this intricate payment scheme by the

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require resolution by the FCC in these cases will already have been resolved by the FCC as a result of the referrals from the Utah, Pennsylvania, and Arizona courts.

[21] Of course, the $0.284 rate was vacated by this Circuit. *MCI Telecomms.*, 143 F.3d at 609.

agency, as well as the FCC's directive that PSPs be compensated as rapidly as possible and the extensive underlying factual discovery necessary to determine the scope of the compensation due plaintiffs, the Court concludes that the doctrine of primary jurisdiction counsels against referral of the FLEX ANI issue.

c. Definition of a "Completed" Call

The final issue referred to the FCC by other courts was related to the definition of a "completed call." The FCC has defined a "completed" call as one "that is answered by the called party." *First Payphone Order* ¶ 63. Defendants argue that this definition is pragmatically insufficient, and that the FCC must, for example, determine whether to permit proxies for call completion, such as duration of the call. The Pennsylvania and Arizona courts hesitantly referred this issue to the FCC.

> At first glance, the issue of what constitutes a "completed" call appears to be one of statutory interpretation well within the conventional experience of judges. Were the scope of the definition of a "completed" call the only issue before the court, the court would be disinclined to defer to the FCC. However, the definition of a 'completed' call is dependent upon the LECs' ability to implement FLEX ANI technology, an issue the court has already referred to the FCC.

Phone-Tel, 100 F.Supp.2d at 321; *see GCB Communications* at 10-11. Because this Court has not referred any other issues to the FCC, the reasoning of the other courts is not applicable. Moreover, the FCC defined a completed call-as a call that has been answered-in September 1996, and has since affirmed the

definition. *See First Payphone Order* ¶ 63.[22] In the *Third Order on Reconsideration*, the FCC explicitly rejected WorldCom's petition to modify the definition, holding that "WorldCom's proposed redefinition runs contrary to our longstanding definition of 'completed' calls to mean calls completed to the called party." *Third Order on Reconsideration* ¶ 7. To the extent that this definition needs any further interpretation, there is nothing technical about the use of the phrase "answered by the called party." If need be, this Court can apply that definition to the facts as determined by discovery.[23]

B. General Factors Weighing Against Referral

In addition to finding that no specific issues warrant referral to the FCC, the Court notes that three other factors counsel against staying this action and deferring to the agency.

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[22] In that order, the Commission expressly considered and rejected using a duration surrogate for completed calls. "We conclude that exempting calls from per-call compensation because they are not of a requisite duration, whether 25 seconds or 60 seconds, would not be in accordance with Section 276's mandate that 'each and every completed intrastate and interstate call' be compensated." *Id.*

[23] Defendants rely heavily on *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031 (10th Cir. 1993), in which the court ordered issues involving billing and collection services for area code 900 calls referred to the FCC. "[T]his case involved the appropriate characterization of a specific and relatively new service, in a rapidly changing industry, which has already been the subject of a number of orders and rulings by the FCC, none of which appears to address the precise issue here. And that precise issue is pending before the FCC now." *Id.* at 1039-40 (emphasis in original). Unlike *Mical*, however, the FCC has ruled on the issues that are necessary to the disposition of these cases, and plaintiffs have not shown that there is a precise issue currently pending before the agency that significantly militates for referral.

First, the risk of inconsistent rulings in this matter is slight because, as noted, the four largest IXCs are currently defendants in parallel cases before this Court. To the extent that the FCC alters its current regulatory framework for payphone calls before these actions are resolved, this Court will undertake to ensure that the changes are applied to all four cases before it.

Second, the lack of progress in the Pennsylvania and Arizona actions since they were stayed pending referral to the FCC counsels strongly against a similar path in this case. The Pennsylvania action was referred in June 2000; the Arizona case was stayed in July 2001. To date, it appears that there has been no progress in those cases. In fact, Qwest goes so far as to argue that the plodding pace of the resolution of issues before the FCC actually militates in favor of referral. "[G]iven the length of time that the FCC has taken (five years) in addressing payphone compensation and it still has not finished, it is reasonable to conclude that the Court might have to render final judgments (or certainly resolve dispositive motions) before the FCC issues key rulings." (Qwest Reply at 10.) This argument misses the point entirely-the doctrine of primary jurisdiction is more apt where agencies can resolve pending issues in a timely manner; a long delay cautions against referral. *See AT & T Communications v. City of Dallas*, 8 F.Supp.2d 582, 590 (N.D. Tex. 1998) (denying motion to dismiss or stay on primary jurisdiction grounds where "[r]eferral to the FCC would lead to lengthy delays, primarily as a result of the Agency's requirement to issue notice and obtain public comments before ruling [and] AT & T's interest in speed outweighs any benefit that might be obtained by soliciting the FCC's opinion on the particular matters at hand"). The Court therefore finds that the interest of judicial efficiency dictates that these actions proceed.

Finally, to the extent that any issues in these actions may ultimately need to be resolved by the FCC, the Court believes that proceeding with discovery at this time is the most prudent

path. First, factual discovery will enable the parties to crystallize any legal issues that may ultimately need to be referred to the FCC. For example, once the parties identify how many calls were made from phones with FLEX ANI technology that was not working properly, it may be more appropriate to seek a Commission ruling on the proper compensation method for those calls. Second, given the extensive amount of discovery that is likely to occur in all three of these cases, it will probably be some time before these legal issues become relevant to the case, assuming that they are pertinent at some point. If that happens, it is possible that the FCC will have ruled on the issues as a result of the referrals in the Utah, Pennsylvania, and Arizona actions-or at the very least, the Commission will have made substantial progress toward issuing an order. In this way, it is hoped that a decision not to stay these actions will promote a more efficient resolution of these matters.

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss or stay pending referral to the FCC are denied. A separate order accompanies this Opinion.

APPENDIX I

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-8001, 04-8002.

AT&T Corp.,

Petitioner,

v.

APCC SERVICES, INC., et al.,

Respondents.

SPRINT COMMUNICATIONS CO., L.P.,

Petitioner,

v.

APCC SERVICES, INC., et al.,

Respondents.

March 1, 2004

BEFORE: ROGERS, TATEL, and ROBERTS, Circuit Judges.

ORDER

PER CURIAM.

Upon consideration of the petitions for permission to appeal pursuant to 28 U.S.C. § 1292(b), the responses thereto, and the replies, it is

ORDERED, on the court's own motion, that these cases be consolidated. It is

FURTHER ORDERED that the petitions be granted. *See* 28 U.S.C. § 1292(b). This court has jurisdiction to consider all issues presented in the district court's September 3, 2003 order, *APCC Servs., Inc. v. AT & T Corp.*, 281 F.Supp.2d 41 (D.D.C.2003), and December 17, 2003 order in *APCC Servs., Inc. v. Sprint*, Civ. No. 01-642. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204-05, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (appellate jurisdiction under § 1292(b) applies to the entire district court order, and is not tied to the particular question formulated by the district court). Approval of the petitions is without prejudice to reconsideration by the merits panel.

The Clerk is directed to transmit a certified copy of this order to the district court. The district court will file the order as a notice of appeal pursuant to Fed. R.App. P. 5 and collect the mandatory docketing fee from appellants. Upon payment of the fee, the district court is to certify and transmit the preliminary record to this court, after which the case will be assigned a general docket number and proceed in the normal course.

APPENDIX J

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 04-7034, 04-7035

APCC SERVICES, INC., as assignee of the claims of and attorney-in-fact for the entities listed in Exhibit A, et al.,	*	September Term, 2005
	*	01cv00642
	*	99cv00696
Appellees,	*	
	*	Filed on:
v.	*	November 10, 2005
SPRINT COMMUNICATIONS CO.,	*	
Appellant.	*	

BEFORE: Ginsburg,* Chief Judge, and Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed July 28, 2005, and the response thereto, it is

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* Chief Judge Ginsburg would grant the petition for rehearing.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

APPENDIX K

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 04-7034, 04-7035

APCC SERVICES, INC., as assignee of the claims of and attorney-in-fact for the entities listed in Exhibit A, et al.,	*	September Term, 2005
	*	01cv00642
	*	99cv00696
Appellees,	*	
	*	Filed on:
v.	*	November 10, 2005
SPRINT COMMUNICATIONS CO.,	*	
Appellant.	*	

BEFORE: Ginsburg,* Chief Judge and Sentelle, Henderson,** Randolph, Rogers, Tatel, Garland, Brown,* and Griffith,* Circuit Judges.

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* Chief Judge Ginsburg and Circuit Judges Brown and Griffith would grant the petition for rehearing en banc.

** Circuit Judge Henderson did not participate in this matter.

ORDER

Appellee's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

APPENDIX L

47 U.S.C. § 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The

Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 205.

Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

47 U.S.C. § 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 208.

Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b) (1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 226.

Telephone operator services

(a) Definitions

As used in this section--

(1) The term "access code" means a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence.

(2) The term "aggregator" means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services.

(3) The term "call splashing" means the transfer of a telephone call from one provider of operator services to another such provider in such a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location.

(4) The term "consumer" means a person initiating any interstate telephone call using operator services.

(5) The term "equal access" has the meaning given that term in Appendix B of the Modification of Final Judgment entered August 24, 1982, in United States v. Western Electric, Civil Action No. 82-0192 (United States District Court, District of Columbia), as amended by the Court in its orders issued prior to October 17, 1990.

(6) The term "equal access code" means an access code that allows the public to obtain an equal access connection to the carrier associated with that code.

(7) The term "operator services" means any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than--

(A) automatic completion with billing to the telephone from which the call originated; or

(B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

(8) The term "presubscribed provider of operator services" means the interstate provider of operator services to which the consumer is connected when the consumer places a call using a provider of operator services without dialing an access code.

(9) The term "provider of operator services" means any common carrier that provides operator services or any other person determined by the Commission to be providing operator services.

(b) Requirements for providers of operator services

(1) In general

Beginning not later than 90 days after October 17, 1990, each provider of operator services shall, at a minimum--

(A) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call;

(B) permit the consumer to terminate the telephone call at no charge before the call is connected;

(C) disclose immediately to the consumer, upon request and at no charge to the consumer--

(i) a quote of its rates or charges for the call;

(ii) the methods by which such rates or charges will be collected; and

(iii) the methods by which complaints concerning such rates, charges, or collection practices will be resolved;

(D) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of subsection (c) of this section and, if applicable, subsection (e)(1) of this section;

(E) withhold payment (on a location-by-location basis) of any compensation, including commissions, to aggregators if such provider reasonably believes that the aggregator (i) is blocking access by means of "950" or "800" numbers to interstate common carriers in violation of subsection (c)(1)(B) of this section or (ii) is blocking access to equal access codes in violation of rules the Commission may prescribe under subsection (e)(1) of this section;

(F) not bill for unanswered telephone calls in areas where equal access is available;

(G) not knowingly bill for unanswered telephone calls where equal access is not available;

(H) not engage in call splashing, unless the consumer requests to be transferred to another provider of operator services, the consumer is informed prior to incurring any charges that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer then consents to be transferred; and

(I) except as provided in subparagraph (H), not bill for a call that does not reflect the location of the origination of the call.

(2) Additional requirements for first 3 years

In addition to meeting the requirements of paragraph (1), during the 3-year period beginning on the date that is 90 days after October 17, 1990, each presubscribed provider of operator services shall identify itself audibly and distinctly to the consumer, not only as required in paragraph (1)(A), but also for a second time before connecting the call and before the consumer incurs any charge.

(c) Requirements for aggregators

(1) In general

Each aggregator, beginning not later than 90 days after October 17, 1990, shall--

(A) post on or near the telephone instrument, in plain view of consumers--

(i) the name, address, and toll-free telephone number of the provider of operator services;

(ii) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and

(iii) the name and address of the enforcement division of the Common Carrier Bureau of the Commission, to which the consumer may direct complaints regarding operator services;

(B) ensure that each of its telephones presubscribed to a provider of operator services allows the consumer to use "800" and "950" access code numbers to obtain access to the provider of operator services desired by the consumer; and

(C) ensure that no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

(2) Effect of State law or regulation

The requirements of paragraph (1)(A) shall not apply to an aggregator in any case in which State law or State regulation requires the aggregator to take actions that are substantially the same as those required in paragraph (1)(A).

(d) General rulemaking required

(1) Rulemaking proceeding

The Commission shall conduct a rulemaking proceeding pursuant to this subchapter to prescribe regulations to--

(A) protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls; and

(B) ensure that consumers have the opportunity to make informed choices in making such calls.

(2) Contents of regulations

The regulations prescribed under this section shall--

(A) contain provisions to implement each of the requirements of this section, other than the requirements established by the rulemaking under subsection (e) of this section on access and compensation; and

(B) contain such other provisions as the Commission determines necessary to carry out this section and the purposes and policies of this section.

(3) Additional requirements to be implemented by regulations

The regulations prescribed under this section shall, at a minimum--

(A) establish minimum standards for providers of operator services and aggregators to use in the routing and handling of emergency telephone calls; and

(B) establish a policy for requiring providers of operator services to make public information about recent changes in operator services and choices available to consumers in that market.

(e) Separate rulemaking on access and compensation

(1) Access

The Commission, shall require--

(A) that each aggregator ensure within a reasonable time that each of its telephones presubscribed to a provider of operator services allows the consumer to obtain access to the provider of operator services desired by the consumer through the use of an equal access code; or

(B) that all providers of operator services, within a reasonable time, make available to their customers a "950" or "800" access code number for use in making operator services calls from anywhere in the United States; or

(C) that the requirements described under both subparagraphs (A) and (B) apply.

(2) Compensation

The Commission shall consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones. Within 9 months after October 17, 1990, the Commission shall reach a final decision on whether to prescribe such compensation.

(f) Technological capability of equipment

Any equipment and software manufactured or imported more than 18 months after October 17, 1990, and installed by any aggregator shall be technologically capable of providing

consumers with access to interstate providers of operator services through the use of equal access codes.

(g) Fraud

In any proceeding to carry out the provisions of this section, the Commission shall require such actions or measures as are necessary to ensure that aggregators are not exposed to undue risk of fraud.

(h) Determinations of rate compliance

(1) Filing of informational tariff

(A) In general

Each provider of operator services shall file, within 90 days after October 17, 1990, and shall maintain, update regularly, and keep open for public inspection, an informational tariff specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided. Any changes in such rates, terms, or conditions shall be filed no later than the first day on which the changed rates, terms, or conditions are in effect.

(B) Waiver authority

The Commission may, after 4 years following October 17, 1990, waive the requirements of this paragraph only if--

(i) the findings and conclusions of the Commission in the final report issued under paragraph (3)(B)(iii) state that the regulatory objectives specified in subsection (d)(1)(A) and (B) of this section have been achieved; and

(ii) the Commission determines that such waiver will not adversely affect the continued achievement of such regulatory objectives.

(2) Review of informational tariffs

If the rates and charges filed by any provider of operator services under paragraph (1) appear upon review by the Commission to be unjust or unreasonable, the Commission may require such provider of operator services to do either or both of the following:

(A) demonstrate that its rates and charges are just and reasonable, and

(B) announce that its rates are available on request at the beginning of each call.

(3) Proceeding required

(A) In general

Within 60 days after October 17, 1990, the Commission shall initiate a proceeding to determine whether the regulatory objectives specified in subsection (d)(1)(A) and (B) of this section are being achieved. The proceeding shall--

(i) monitor operator service rates;

(ii) determine the extent to which offerings made by providers of operator services are improvements, in terms of service quality, price, innovation, and other factors, over those available before the entry of new providers of operator services into the market;

(iii) report on (in the aggregate and by individual provider) operator service rates, incidence of service complaints, and service offerings;

(iv) consider the effect that commissions and surcharges, billing and validation costs, and other costs of doing business have on the overall rates charged to consumers; and

(v) monitor compliance with the provisions of this section, including the periodic placement of telephone calls from aggregator locations.

(B) Reports

(i) The Commission shall, during the pendency of such proceeding and not later than 5 months after its commencement, provide the Congress with an interim report on the Commission's activities and progress to date.

(ii) Not later than 11 months after the commencement of such proceeding, the Commission shall report to the Congress on its interim findings as a result of the proceeding.

(iii) Not later than 23 months after the commencement of such proceeding, the Commission shall submit a final report to the Congress on its findings and conclusions.

(4) Implementing regulations

(A) In general

Unless the Commission makes the determination described in subparagraph (B), the Commission shall, within 180 days after submission of the report required under paragraph (3)(B)(iii), complete a rulemaking proceeding pursuant to

this subchapter to establish regulations for implementing the requirements of this subchapter (and paragraphs (1) and (2) of this subsection) that rates and charges for operator services be just and reasonable. Such regulations shali include limitations on the amount of commissions or any other compensation given to aggregators by providers of operator service.

(B) Limitation

The requirement of subparagraph (A) shall not apply if, on the basis of the proceeding under paragraph (3)(A), the Commission makes (and includes in the report required by paragraph (3)(B)(iii)) a factual determination that market forces are securing rates and charges that are just and reasonable, as evidenced by rate levels, costs, complaints, service quality, and other relevant factors.

(i) Statutory construction

Nothing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this chapter.

47 U.S.C. § 276.

Provision of payphone service

(a) Nondiscrimination safeguards

After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service--

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) Regulations

(1) Contents of regulations

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that--

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on

February 8, 1996, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

(2) Public interest telephones

In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

(3) Existing contracts

Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of February 8, 1996.

(c) State preemption

To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

(d) "Payphone service" defined

As used in this section, the term "payphone service" means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.

47 U.S.C. § 401. Enforcement provisions

(a) Jurisdiction

The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

(b) Orders of Commission

If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Duty to prosecute

Upon the request of the Commission it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of

the appropriations for the expenses of the courts of the United States.

47 U.S.C. § 402.

Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal

and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

§ 416. Orders of Commission

(a) Service

Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

(b) Suspension or modification

Except as otherwise provided in this chapter, the Commission is authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

(c) Compliance

It shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with such orders so long as the same shall remain in effect.

No. 05-766

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SUPREME COURT, U.S.

IN THE

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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (collectively, the "Telcom Act"), confers a private right of action for damages for alleged violations of the FCC's 1999 "dial-around" payphone compensation plan ("1999 Order").

2. Whether a subsequent order promulgated by the FCC in 2003, which determined that the 1999 Order was unworkable and replaced it with a substantively new compensation plan, retroactively can form the basis of a private right of action under the Telcom Act for lawsuits that were filed prior to the 2003 Order and that allege violations only of the superseded 1999 Order.

3. Whether Petitioners have standing to sue under the Telcom Act for alleged violations of the 1999 Order when the payphone service providers ("PSPs") that Petitioners purport to represent assigned their claims to Petitioners solely for collection purposes, any and all proceeds that Petitioners collect must be passed back to the PSP-assignors, and Petitioners have no financial interest in the outcome of the litigation.

RULE 29.6 DISCLOSURES

A. The shares of Respondent AT&T Corp. are 100 percent owned by AT&T, Inc.

B. Respondent Sprint Communications Company L.P. is a limited partnership and is indirectly wholly-owned by Sprint Nextel Corporation. The partners of Sprint Communications Company L.P. are: U.S. Telecom, Inc., which is the general partner and wholly-owned subsidiary of Sprint Nextel Corporation; UCOM, Inc., which is a limited partner; Utelcom, Inc., which is a limited partner; and Sprint International Communications Corporation, which is a limited partner. Sprint Nextel Corporation is a holding company which offers shares of stock to the public under the symbol "S". Only Sprint Nextel Corporation offers shares of stock on public markets. No person or entity owns more than ten percent of Sprint Nextel Corporation's stock.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

Respondents AT&T Corp. ("AT&T") and Sprint Communications Company L.P. ("Sprint") respectfully submit this brief in opposition to the Petition of APCC Services, Inc., *et al.* ("Petitioners") for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

STATUTES AND REGULATIONS

The relevant statutory provisions are set forth in the Petition at App. 152a-179a.

INTRODUCTION

The Petition seeks review of a D.C. Circuit decision holding that alleged violations of a payphone compensation plan adopted by the FCC in 1999 are not privately enforceable in federal court under §§ 276, 416(c), or 201(b) of the Telcom

Act. Petitioners wrongly claim that the D.C. Circuit erred in its analysis of each of the three statutes, and that the court's analysis of § 201(b), in particular, creates an "irreconcilable" conflict with *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056 (9th Cir.), *petition for cert. filed*, 74 U.S.L.W. 3352 (U.S. Nov. 25, 2005) (No. 05-705).

The Petition does not present any question requiring this Court's review and should be denied. The D.C. Circuit applied well established, properly stated rules of law and reached the correct result on all counts. The D.C. and Ninth Circuits are the only courts of appeals to address private enforcement of the various payphone compensation plans adopted by the FCC. Applying *Alexander v. Sandoval*, 532 U.S. 275 (2001), both courts found nothing in the text of § 276 that suggests Congress intended for these regulatory plans to be privately enforceable in federal court. Both courts also are in accord in ruling that § 416(c) cannot be read to supply such a private remedy. With respect to the § 201(b) question, the two courts considered different payphone compensation plans established in different FCC Orders that were issued several years apart. Petitioners brought suit here for alleged violations of the 1999 Order; hence, the D.C. Circuit focused its analysis on that Order. It held that the FCC had not rendered any interpretation of § 201(b) in the 1999 Order, much less an authoritative interpretation worthy of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). By contrast, the PSPs in *Metrophones* brought suit for alleged violations of the 2001 Order; in rendering its holding, the Ninth Circuit did not review the 1999 Order but instead reviewed the FCC's 2003 Order, which replaced the 2001 and 1999 Orders and adopted a new payphone compensation plan. Thus, the Petition is wrong in claiming that the two decisions pose a direct and irreconcilable conflict. Because the D.C. and Ninth Circuits

were examining the § 201(b) question in the context of very different FCC Orders, the so-called "split" between their decisions is not a suitable one for review by this Court.

In addition to reaching the correct result, the D.C. Circuit's decision does not merit review for other reasons. By suggesting that the D.C. Circuit should have made a primary jurisdiction referral to the FCC, Petitioners virtually concede that intervention by this Court is unwarranted at this time. If the FCC believes that a violation of its most recent payphone compensation plan should be actionable in federal court pursuant to § 201(b), the agency can and should justify that interpretation in a properly noticed rulemaking based on an adequate administrative record. Any such FCC determination would be judicially reviewable in the ordinary course.

Moreover, § 201(b) does not expressly authorize the FCC to promulgate retroactive rules. The 2003 Order, which adopted a new payphone compensation plan, cannot be used to supply a private right of action for alleged violations of the 1999 Order, which by the FCC's own account imposed different substantive obligations, was ambiguous in material respects, and proved unworkable.

In any event, the § 201(b) question has limited importance. Petitioners' claims are based solely on alleged violations of the compensation plan established in the 1999 Order. The FCC abandoned that plan and adopted new compensation plans in the 2001 and 2003 Orders. Because the limitations period for payphone compensation claims is two years, any new claims for alleged violations of the 1999 Order would be time-barred. The issues presented by Petitioners, therefore, are the last of their kind.

Finally, this case is not a proper vehicle for review of any of the questions presented in the Petition because serious issues exist concerning the standing of virtually all of the

Petitioners. This Court would need to resolve these issues, to ensure that Article III standing requirements are satisfied, before addressing the questions presented in the Petition.

COUNTERSTATEMENT OF THE CASE

A. The Payphone Compensation Directive In § 276 Of The Telcom Act

Historically, the Bell Operating Companies ("BOCs") and other similar local exchange carriers ("LECs") were the exclusive providers of payphone service ("PSPs"). In the mid-1980s, advances in computer technology began to enable payphones to perform many of the control and supervision functions of the BOCs' networks, opening the door for new entrants to offer competitive payphone service. *New England Pub. Commc'ns Council, Inc. v. FCC*, 334 F.3d 69, 71 (D.C. Cir. 2003).

Despite these advances, PSPs that were unaffiliated with a BOC remained at a competitive disadvantage. Consumers increasingly were using calling card platforms (subscriber 800 calls) and other means to "dial around" the PSP's pre-subscribed interexchange carrier ("IXC") and to place calls from payphones without using coins. Independent PSPs thus received no compensation for these calls. By contrast, BOCs received some compensation for dial-around calls through the intrastate and interstate access charges that IXCs, like Sprint and AT&T, paid for use of the LECs' networks. App. 2a; *see also In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996* ("*Payphone Docket*"), Notice of Proposed Rulemaking ("1996 NPRM"), 11 F.C.C.R. 6716, 6721 (¶ 7) (1996).

Congress addressed this issue (and others) in the Telecommunications Act of 1996, which amended the Communications Act of 1934 with the express goal of "opening all

telecommunications markets to competition." S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996). Section 276 of the Telcom Act, in particular, was enacted to promote "competition among payphone service providers [and] the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1). The most relevant mandate of § 276 directs the FCC to "establish a per call compensation plan to ensure that all [PSPs] are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ." *Id.* § 276(b)(1)(A).

B. The FCC's Payphone Compensation Orders

Over the past decade, the FCC has issued a series of orders attempting to implement the payphone compensation directive of § 276(b)(1)(A).[1] The FCC has considered various regulatory approaches to compensate PSPs for dial-around calls. *Payphone Docket*, Report & Order ("1996 Order"), 11 F.C.C.R. 20,541, 20,580-86 (¶¶ 77-87) (1996). One approach would have required the *calling party* to deposit coins into the

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[1] *See Payphone Docket*, NPRM, 11 F.C.C.R. 6716 (1996); Report & Order, 11 F.C.C.R. 20,541 (1996); Order on Recons., 11 F.C.C.R. 21,233 (1996), *aff'd in part and remanded in part sub nom. Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997); Second Report & Order, 13 F.C.C.R. 1778 (1997), *aff'd in part and remanded in part sub nom. MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); Third Report & Order and Order on Recons. of the Second Report & Order, 14 F.C.C.R. 2545 (1999), *aff'd sub nom. APCC v. FCC*, 215 F.3d 51 (D.C. Cir. 2000); Second Order on Recons., 16 F.C.C.R. 8098 (2001); Third Order on Recons. and Order on Clarification, 16 F.C.C.R. 20,922 (2001), *remanded sub nom. Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003); Fourth Order on Recons. and Order on Remand, 17 F.C.C.R. 2020 (2002); Fifth Order on Recons. and Order on Remand, 17 F.C.C.R. 21,274 (2002), *aff'd sub nom. AT&T v. FCC*, 363 F.3d 504 (D.C. Cir. 2004); Report & Order, 18 F.C.C.R. 19,975 (2003); *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238 (D.C. Cir.) *pet. for reh'g denied*, No. 04-7034, 2005 U.S. App. LEXIS 24402 (D.C. Cir. Nov. 10, 2005).

payphone before placing a call. 1996 NPRM, 11 F.C.C.R. at 6730 (¶ 27). Another approach would have charged the *called party* a "set use" fee for the payphone call, which would have been billed and collected by IXCs on a monthly basis (much like a collect call). *Id.* at 6729-30 (¶ 26). The FCC concluded that either of these approaches would satisfy § 276(b)(1)(A)'s mandate, but ultimately the agency determined that it would be more administratively efficient to adopt a "carrier-pays" approach, under which the IXC or switch-based reseller ("SBR") that "terminates" the payphone call compensates the PSPs. 1996 Order, 11 F.C.C.R. at 20,586 (¶ 86); *Payphone Docket*, Order on Recons., 11 F.C.C.R. 21,233, 21,277 (¶ 92) (1996). The FCC found this approach "preferable because it would result in less transaction costs because the toll-carrier could aggregate its payments to [PSPs, whereas] [u]nder a set use fee . . . these payments would be spread among a vast number of payphone callers through their individual telephone bills." 1996 Order, 11 F.C.C.R. at 20,580 (¶ 77).

Petitioners wrongly claim that the FCC invoked § 201(b) of the Telcom Act, which makes it unlawful for common carriers to engage in "unjust or unreasonable" practices, as a basis for the payphone compensation plan adopted in the 1996 Order. Pet. 7. In fact, throughout the Order, the FCC consistently stated that it was implementing a compensation plan for interstate and intrastate dial-around calls pursuant to the express congressional directive in § 276. *See, e.g.*, 1996 Order, 11 F.C.C.R. at 20,551-604 (¶¶ 20-126). Nowhere in the 1996 Order did the agency assert that an alleged violation of its compensation plan for such calls would be privately enforceable under § 201(b). Indeed, the FCC only referred to § 201(b) (as well as § 4(i) of the Telcom Act) as a source of authority to regulate dial-around international calls, which § 276—by its express terms—does not encompass. *Id.* at 20,569 (¶ 54).

In 1999, the FCC issued another order establishing the compensation rate for the "carrier-pays" approach outlined in its 1996 Order. *Payphone Docket*, Third Report & Order and Order on Recons. of Second Report & Order ("1999 Order"), 14 F.C.C.R. 2545, 2553-54 (¶ 18), 2597-98 (¶¶ 115-116) (1999). The public notice seeking comment on the proposed 1999 Order gave no indication that the agency was considering classifying violations of the payphone compensation plan as "unjust or unreasonable" practices within the meaning of § 201(b), redressable in federal court. *Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding*, Public Notice, 13 F.C.C.R. 12,093 (1998). And the 1999 Order itself contains only a single general reference to § 201, along with a laundry-list of other statutes, in the boilerplate "ordering clause" at the end of the Order. 1999 Order, 14 F.C.C.R. at 2648 (¶ 232).

The 1999 Order had a short shelf-life. Early on, some independent PSPs complained to the FCC that the compensation plan established in the 1999 Order was not working. The PSPs primarily claimed that they were not receiving compensation for certain dial-around calls handled by SBRs. Responding to these complaints in 2001, the FCC concluded that the 1999 Order "ha[d] not had the intended effect of ensuring that PSPs receive compensation for each and every completed, coinless payphone call." *Payphone Docket*, Second Order on Recons. ("2001 Order"), 16 F.C.C.R. 8098, 8103 (¶ 10) (2001). To address these problems, the FCC substantively modified its payphone compensation plan to require the first IXC in the call path to compensate the PSP for a completed dial-around call, even if the call was ultimately terminated by a SBR. *Id.* (¶ 11). The IXCs were then assigned responsibility for seeking reimbursement from the SBRs. *Id.* The FCC posited that this new plan should "address the difficulty which PSPs face in obtaining compensation for coinless calls placed from payphones which involve a [SBR] in the call path," and thus "remedy this failure in the

[original] compensation regime" established in the 1999 Order. *Id.* at 8098 (¶ 1), 8103 (¶ 10).

The 2001 Order was vacated by the D.C. Circuit, which held that the FCC had promulgated the new compensation plan without proper notice and comment, in violation of the Administrative Procedure Act ("APA"). *Sprint Corp. v. FCC*, 315 F.3d 369, 372, 377 (D.C. Cir. 2003). On remand, the FCC issued a Further Notice of Proposed Rulemaking seeking comment on whether the compensation plan adopted in the 2001 Order or another compensation plan would better satisfy the objectives of § 276. *Payphone Docket*, Further Notice of Proposed Rulemaking ("2003 NPRM"), 18 F.C.C.R. 11,003, 11,005 (¶ 3) (2003). The 2003 NPRM did not mention § 201(b) let alone indicate that the FCC was considering making any finding that a violation of the compensation plan would constitute an "unjust or unreasonable" practice under the statute.

In August 2003, the Ninth Circuit held that Congress did not intend for violations of the FCC's payphone compensation plan to be privately enforceable in federal court under § 276. *Greene v. Sprint Commc'ns Co.*, 340 F.3d 1047 (9th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004). The Ninth Circuit found that Congress intended for such compensation disputes to be handled by the FCC as part "of a coherent national communications policy." *Id.* at 1053 (citations omitted).

In October 2003, the FCC issued its third payphone compensation plan. *Payphone Docket*, Report & Order ("2003 Order"), 18 F.C.C.R. 19,975 (2003). The 2003 Order "squarely" places responsibility for payphone compensation on the carrier who terminates completed dial-around calls, whether the carrier is an IXC or a SBR. *Id.* at 19,986 (¶ 24). The 2003 Order also imposes new call-tracking and reporting obligations to reduce compensation disputes. In announcing this newest plan, the FCC stated that it was "guided by [its]

practical expertise in overseeing the various compensation regimes [the agency] implemented since the adoption of section 276 in the 1996 Act." *Id.* at 19,987 (¶ 26). Because the 2001 Order "did not optimally ensure fair compensation, we are adopting new rules today to replace it." *Id.* at 19,984 (¶ 20). The FCC also established a prospective effective date for the 2003 Order, "[t]o provide carriers time to transition to our new rules . . . ." *Id.* at 20,004 (¶ 55).

In addition to adopting a new payphone compensation plan, the FCC inserted a single reference to § 201(b) in the 2003 Order that was plainly a *post hoc* reaction to *Greene*. The sentence asserts, without prior notice or any accompanying rationale, that

> failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of § 276 and an unjust and unreasonable practice in violation of § 201(b) of the Act.

Id. at 19,990 (¶ 32).

In contrast to the episodic and cursory references to § 201 in the FCC's various payphone orders, the agency has established detailed administrative complaint procedures for PSPs and IXCs to resolve payphone compensation disputes. 1996 Order, 11 F.C.C.R. at 20,569-73 (¶¶ 55-61). The 1996 Order instructs PSPs to file complaints with the FCC; explains when particular claims are ripe for agency adjudication (*e.g.*, only after a required call "verification" process); provides "timeliness" defenses (*i.e.*, for claims submitted more than a year after a payment period); and establishes when the federal limitations period for compensation claims commences. *Id.* at 20,597-98 (¶¶ 112-114). The FCC committed "aggressively [to] take action on such complaints." *Id.* at 20,598 (¶ 114). Numerous PSPs, including Petitioners, have availed themselves of these administrative complaint procedures in seeking alleged underpayments of payphone

compensation from IXCs and SBRs. *See, e.g., APCC Servs., Inc. v. Network IP, LLC*, 20 F.C.C.R. 2073 (2005); *APCC Servs., Inc. v. TS Interactive, Inc.*, 19 F.C.C.R. 10,456 (2004); *Bell Atl.-Del., Inc. v. MCI Telecomms. Corp.*, 17 F.C.C.R. 15,918 (2002).

C. Relevant Case Proceedings

1. *The Petitioners' Assignments From PSPs*

Petitioners sued AT&T and Sprint in 1999 and 2001, respectively, for alleged violations of the original payphone compensation rules established in the 1999 Order. With one exception (People's Telephone Company, a plaintiff in the litigation against AT&T), the Petitioners are "aggregators"—a telecommunications industry term for corporations that contract with PSPs to handle billing and collection of dial-around compensation. App. 3a. Petitioners sued as aggregators under assignments in which the PSP "assigns, transfers, and sets over to [the aggregator] *for purposes of collection* all rights, title, and interest of the [PSP] in the [PSP's] claims, demands or causes of action for 'Dial Around Compensation.'" App. 4a (emphasis added). Each assignment appoints the aggregator as attorney-in-fact with power to take all action necessary to collect dial-around compensation, including the right to retain counsel, file lawsuits, and enter into settlements. App. 4a. Under the assignments, the Aggregator-Petitioners must pass back to the PSPs any and all amounts they collect. App. 4a, 9a. Nor do they have any other financial interest in the outcome of the litigation: their compensation is not tied to litigation success, but rather to "the number of payphones and telephone lines operated by their PSP clients." App. 23a.

2. *The District Court Rulings*

On March 28, 2003, the district court dismissed the Aggregator-Petitioners' claims in the AT&T case for lack of standing, holding that the assignments of the payphone

compensation claims were invalid. App. 94a-108a. On reconsideration, the district court reversed itself and ruled that the assignments vested the Aggregator-Petitioners with a concrete interest in the litigation sufficient to establish Article III standing. App. 61a-78a.

Contemporaneously, a district court in California held, in an action brought by PSPs, that Congress did not intend to create a private right of action under § 276 for payphone compensation disputes. *Greene v. Sprint Commc'ns*, 02-3841, slip op. (C.D. Cal. July 1, 2002). The district court in *Greene* held that § 276 does not confer a private cause of action under § 207, because § 276 can be violated only by the FCC, not by common carriers. The district court also held that the payphone compensation plan promulgated by the FCC could not serve as a basis for a private cause of action under § 207, because § 207 only creates causes of action for violations of the Telcom Act, not FCC regulations. *Id.* at 3-5.

In response to the district court's decision in *Greene*, Petitioners moved to amend their complaint in the Sprint case to add alternative causes of action under §§ 201(b), 407, and 416(c) of the Telcom Act. The district court granted Petitioners leave to amend their complaint. App. 79a-80a. Petitioners did not seek leave to amend their complaint in the AT&T case.

Shortly thereafter, the Ninth Circuit in *Greene* affirmed the district court's determination that Congress did not intend to create a private right of action for payphone compensation disputes. *Greene*, 340 F.3d at 1053. Sprint sought dismissal of Petitioners' claims in this case based on the Ninth Circuit's ruling in *Greene*. App. 31a-45a. AT&T moved for reconsideration of the district court's ruling on the standing issue, and also requested dismissal based on the *Greene* decision. App. 46a-60a. The district court denied the motions in both cases, but certified the private right of action and standing

questions for interlocutory appeal. App. 45a, 59a. The D.C. Circuit accepted both questions and consolidated the two cases for review. App. 146a-147a.

3. *The D.C. Circuit's Decision*

By a 2-1 vote, the D.C. Circuit affirmed the district court's determination that the Aggregator-Petitioners had standing to sue as assignees. App. 5a-11a. Judge Sentelle dissented from this part of the decision. Because the assignments gave the Aggregator-Petitioners the right to sue but not the right to recovery, Judge Sentelle opined that the Aggregator-Petitioners lacked a sufficient interest in the outcome to establish Article III standing. App. 20a-25a. Judge Sentelle also found that "associational" standing principles were inapplicable because the Aggregator-Petitioners were not an association. App. 25a.

The D.C. Circuit reversed the district court's ruling on the private right of action question. Concurring with the Ninth Circuit's decision in *Greene*, the D.C. Circuit held that "§ 276 does not create a right of action for a PSP (or its assignee) to recover dial-around compensation from an IXC." App. 13a. The D.C. Circuit observed that "[§ 276] is by its terms addressed neither to the rights of PSPs nor to the obligations of IXCs." App. 13a. Like the statute considered by this Court in *Sandoval* (§ 602 of Title VI of the Civil Rights Act, 42 U.S.C. § 2000-1), the D.C. Circuit noted that § 276 contains no "rights-creating" language that demonstrates a congressional intent to create a private right of action. Indeed, § 276 is "'yet a step further removed: It focuses . . . on the agenc[y] that will do the regulating.' Section 276 is addressed only to 'the Commission,' which it directs to 'take all actions necessary . . . to ensure that all [PSPs] are fairly compensated' for the calls they originate." App. 14a (quoting *Sandoval*).

By a 2-1 vote, a different majority of the D.C. Circuit further held that § 201(b) does not support a private right of

action for alleged violations of the 1999 Order. App. 14a-17a. The D.C. Circuit observed that Petitioners' arguments (which the FCC supported as *amicus*) "would transform § 201(b) into a catchall provision, converting any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court. This result is not plainly evident from the text of the Act, and nothing suggests that Congress intended its words to have such a sweeping effect." App. 15a. The D.C. Circuit also emphasized that the 1999 Order contained just a single general reference to § 201 in the boilerplate "ordering clause" at the end of the order, along with a laundry list of other statutes. App. 15a; *see also* 1999 Order, 14 F.C.C.R. at 2648 (¶ 232). The FCC's only discussion in the 1999 Order about enforcement of the payphone rules contemplated "that [such] collection actions will be *before the Commission* (as indeed they must be in any action by a carrier against a PSP for not making a refund)." App. 16a (emphasis added).

In a *post hoc* attempt to rationalize some private right of action, Petitioners and the FCC contended that the D.C. Circuit should afford *Chevron* deference to the single reference to § 201(b) in the 2003 Order. Petitioners and the FCC failed to explain how this bare, unsubstantiated assertion in the 2003 Order—which established a new payphone compensation plan with only prospective effect—could provide retroactively a private right of action for alleged violations of the twice-superseded payphone compensation plan established in the 1999 Order. The D.C. Circuit did not address the 2003 Order. It held that there was "no authoritative interpretation of § 201(b) in this case" to support a private right of action for alleged violations of the 1999 Order. App. 16a. Chief Judge Ginsburg dissented on the § 201(b) issue. He would have afforded *Chevron* deference to the single reference to § 201(b) in the 2003 Order on the theory that it made "explicit" what was "implicit" in the 1999 Order. App. 26a-30a.

Finally, the D.C. Circuit held that § 416(c) does not supply a private right of action for payphone compensation disputes. App. 17a-20a. Section 416(c) states that "[i]t shall be the duty of every person . . . to observe and comply with [every order of the Commission] so long as the same shall remain in effect." 47 U.S.C. § 416(c). The D.C. Circuit "agree[d] entirely" with the analysis of then-Judge Breyer in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 4-9 (1st Cir. 1984), that § 401(b) of the Communications Act is limited to adjudicatory orders. App. 20a. The D.C. Circuit likewise concluded that the term "order," as used in § 416(c), refers only to adjudicatory and not to rulemaking decisions. App. 19a-20a. The D.C. Circuit observed that any contrary interpretation making § 416(c) generally applicable to FCC regulations would "'interfere seriously with the well established principle that the 'enforcement' of the Communications Act is entrusted primarily to' the FCC . . . rather than to the district courts." App. 19a (quoting *New England Telephone*, 742 F.2d at 5).

Petitioners sought rehearing and rehearing en banc, arguing that the D.C. Circuit erred by failing to afford *Chevron* deference to the FCC's bare reference to § 201(b) in the 2003 Order. Alternatively (and for the first time), Petitioners asked the D.C. Circuit to refer the § 201(b) question to the FCC under the primary jurisdiction doctrine. Both petitions were denied. App. 148a-149a; App. 150a-151a.

D. The Ninth Circuit's Decision In *Metrophones*

While the rehearing petitions were pending before the D.C. Circuit, the Ninth Circuit decided *Metrophones*.[2] The PSPs in *Metrophones* brought suit alleging violations of the payphone compensation plan established in the 2001 Order.

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[2] Petitioners submitted *Metrophones* to the D.C. Circuit for consideration in conjunction with their request for rehearing and rehearing en banc.

Compl. ¶ 1, *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, No. 03-0694 (W.D. Wash. Mar. 19, 2003). The Ninth Circuit reaffirmed its prior ruling in *Greene* that Congress did not intend to make the FCC's payphone compensation plan privately enforceable in federal court under § 276. *Metrophones*, 423 F.3d at 1063-64. The Ninth Circuit likewise held that § 416(c) does not provide a private right of action for such disputes. *Id.* at 1071. Finally, the Ninth Circuit ruled that the FCC's reference to § 201(b) in the 2003 Order, while admittedly brief, was worthy of *Chevron* deference when "supplemented" by the agency's *amicus* brief in the case. *Id.* at 1066-67. Thus, even though the PSPs in *Metrophones* had sued under the 2001 Order, the Ninth Circuit viewed the 2003 Order as establishing retroactively a federal private right of action under § 201(b) for payphone compensation claims.

REASONS FOR DENYING THE PETITION

I. THE "SPLIT" BETWEEN THE D.C. AND NINTH CIRCUITS ON THE § 201(b) QUESTION DOES NOT MERIT THIS COURT'S REVIEW.

The Petition first seeks review of an asserted "conflict" between the D.C. and Ninth Circuits' rulings on the § 201(b) private right of action question. This supposed "conflict" is overstated and, in all events, does not warrant the Court's attention for several reasons.

A. The D.C. and Ninth Circuits Examined Different FCC Orders And Compensation Plans In Analyzing The § 201(b) Issue.

Petitioners wrongly portray the D.C. and Ninth Circuit decisions as creating an irreconcilable conflict on whether § 201(b) creates a private right of action for violations of the FCC's payphone compensation plan. In fact, the two courts examined different payphone compensation plans in different

FCC Orders issued several years apart in reaching their respective § 201 determinations.

1. *The D.C. Circuit Examined The 1999 Order.*

Petitioners brought suit against AT&T and Sprint for alleged violations of the payphone compensation plan adopted in the FCC's 1999 Order. For this reason, the D.C. Circuit properly focused on the 1999 Order in considering whether the FCC had interpreted § 201(b) to encompass alleged violations of that compensation plan.

The D.C. Circuit found nothing in the 1999 Order that could possibly be deemed an authoritative interpretation of § 201(b) by the FCC, worthy of *Chevron* deference. The 1999 Order contains only a single general reference to § 201 along with a laundry list of other statutes cited at the end of the Order. 1999 Order, 14 F.C.C.R. at 2648 (§ 232). Because the 1999 Order barely mentioned § 201, and utterly failed to interpret it, the D.C. Circuit properly concluded that there was no basis to find that a violation of the compensation plan established in the 1999 Order constituted an "unjust or unreasonable" practice under subpart (b) of the statute. As the D.C. Circuit explained:

> the body of the FCC's 1999 "Order" said not a word about § 201(b). All we see is boilerplate in the ordering clause, and in the clause identifying the authority for Part 64 of the rules, citing a list of sections including "201." (This is in marked contrast to the treatment of § 276, which the Commission mentioned throughout as the source of its authority.) It cannot be that the mere citation of § 201 displays—in *Sandoval's* words—an intent that the regulation setting the compensation level should be privately enforceable in court. Still less can it be that the mere citation of § 201 is entitled to *Chevron* deference . . . .

App. 15a-16a.

Chevron deference to the passing reference to § 201 in the 1999 Order is unwarranted for an additional reason. A statutory interpretation reached through rulemaking conducted in conformity with the APA notice-and-comment requirement has the twin attributes of fairness to interested parties and careful deliberation by the agency that justify treating the interpretation as having the force of law, worthy of *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996). Here, the public notice that preceded the 1999 Order sought comment on several enumerated issues, including, for example, whether "other market-based methodologies [besides carrier-pays] could be used to establish a per-call compensation rate for coinless calls." Public Notice, 13 F.C.C.R. at 12,094. It did not, however, mention or seek comment on the issue of whether violations of the payphone compensation plan should be classified as "unjust or unreasonable" practices within the meaning of § 201(b).[3]

Recognizing these problems, Petitioners contend that the D.C. Circuit should have afforded *Chevron* deference to the FCC's passing reference to § 201(b) in the 2003 Order, as a basis for treating (retroactively) violations of the 1999 Order as "unjust or unreasonable practices." Pet. 16-19. This contention fails on several grounds.

The 2003 Order is irrelevant because Petitioners did not sue AT&T or Sprint for violations of the 2003 Order. Moreover, there is a presumption against retroactive rulemaking that precludes Petitioners from basing their claims on the 2003 Order. "[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to

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[3] In noting the absence of any *Chevron*-worthy interpretation of § 201(b), the D.C. Circuit also expressed concern about the "potential consequences to judicial dockets" if the FCC were free to declare, without prior notice or explanation, that certain practices violated the statute. App. 16a.

encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Congress did not expressly authorize the FCC to promulgate retroactive rules under § 201(b). Thus, the 2003 Order, which adopted a new compensation plan, cannot be used to supply a private right of action for claims based on violations of the original compensation plan adopted in the 1999 Order, which—by the FCC's own description—imposed different substantive obligations on IXCs and PSPs, was ambiguous in material respects, and proved unworkable. 2003 Order, 18 F.C.C.R. at 19,983 (¶¶ 18-19). Indeed, the FCC itself said that the 2003 Order had only prospective effect. *Id.* at 20,004 (¶ 55).

Petitioners are likewise mistaken in asserting that *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688 (2005), requires that *Chevron* deference be afforded to the 2003 Order's passing reference to § 201(b). Apart from the fact that Petitioners sued AT&T or Sprint for alleged violations of the 1999 Order, *Brand X* only underscores the lack of any authoritative interpretation of § 201(b) by the FCC. In contrast to the unexplained and cursory citation to § 201(b) in the 2003 Order, which was not presaged in the 2003 NPRM, the FCC order examined in *Brand X* followed from a notice of proposed rulemaking that announced the subject matter of the rulemaking and direction of the agency. Further, the *Brand X* order contained a detailed analysis of the agency's reasoning based on an extensive administrative record. *Id.* at 2697-99, 2708-11.

Lastly, Petitioners improperly rely on arguments made by the FCC in its *amicus* brief to the D.C. Circuit, asserting that the agency's pronouncements about § 201(b) deserve deference under *Chevron* and *Brand X*. Pet. 18. This Court has long held that such "post-hoc rationalizations for agency [orders]," proffered in litigation, are never a *Chevron* sub-

stitute when the agency failed to justify the order when issued. *Bowen*, 488 U.S. at 212 (internal quotations omitted). Nothing in *Brand X* changed this basic principle of administrative law.

2. *The Ninth Circuit Examined The 2003 Order.*

Unlike Petitioners, the PSPs in *Metrophones* brought suit for alleged violations of the new compensation plan established in the 2001 Order—and not for alleged violations of the original compensation plan adopted in the 1999 Order. Thus, in considering the § 201(b) question in *Metrophones*, the Ninth Circuit did not examine the 1999 Order.

The Ninth Circuit posited that the FCC's passing reference to § 201(b) in the 2003 Order, when "supplemented" by the agency's *amicus* brief in the case, was entitled to *Chevron* deference and sufficient to create a private right of action in federal court for the PSPs. *Metrophones*, 423 F.3d at 1066-67. The Ninth Circuit did not explain how the 2003 Order, which the FCC itself said had only prospective effect, could provide the basis for a § 201(b) claim arising solely from alleged violations of the earlier (and substantively different) payphone compensation plan adopted in the 2001 Order.[4]

Ultimately, whether (as Petitioners contend) the Ninth Circuit was right in its analysis of § 201(b) does not affect the

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[4] The FCC's citation to § 201(b) in the 2003 Order is not a *Chevron*-worthy interpretation, even assuming the order were otherwise relevant to the actual claims asserted by the PSPs. The 2003 NPRM did not indicate that the FCC was considering deeming violations of its forthcoming payphone compensation plan an unjust or unreasonable practice for purposes of § 201(b). *See* 2003 NPRM, 18 F.C.C.R. at 11,003-28 (¶¶ 1-71). The statement was inserted without prior notice, one month after the *Greene* decision rejecting a private right of action under § 276, and without any administrative record, analysis, or supporting rationale. It was not the product of the kind of reasoned deliberative process that warrants *Chevron* deference. *Accord Motor Vehicles Mfrs. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983).

proper disposition of the Petition. Because the D.C. and Ninth Circuits were dealing with different payphone compensation plans, established in different FCC Orders, their § 201(b) rulings do not present an irreconcilable conflict that justifies this Court's review.[5]

B. The § 201(b) Question Can Be Readily Addressed By The FCC In A Proper Rulemaking And Without Intervention By This Court.

As indicated, the 2003 Order was adopted to reduce, if not eliminate, future payphone compensation disputes based on the FCC's "practical expertise in overseeing the various compensation regimes . . . implemented" under § 276. 2003 Order, 18 F.C.C.R. at 19,987 (¶ 26). Should future disputes arise under the 2003 Order, PSPs and others can pursue their claims through the administrative complaint procedures established by the FCC.

The D.C. Circuit was skeptical that a violation of the FCC's payphone compensation plan could be properly characterized as an "unjust or unreasonable practice" within the meaning of § 201(b). App. 15a. That said, if the FCC believes that § 201(b) can be properly interpreted to encompass alleged violations of the payphone compensation plan established in the 2003 Order, the agency should justify its position in a properly noticed rulemaking, based on an adequate administrative record. Any such rulemaking by the

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[5] A district court in Utah recently certified the § 201(b) question for interlocutory appeal to the Tenth Circuit. *Flying J Inc. v. Sprint Commc'ns Co. L.P.*, No. 99-111 (D. Utah). Further consideration of the § 201(b) question by other circuit courts may help to clarify whether the D.C. and Ninth Circuits' analyses of the different FCC Orders present any genuine or lasting confusion or tension over these issues. *See* Justice John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (Nov. 1982) (from the Court's perspective, "experience with conflicting interpretations of federal rules [of law] may help illuminate an issue before it is finally resolved").

FCC would also be judicially reviewable in the ordinary course. *See* 28 U.S.C. § 2341 *et seq.* There is thus no need for this Court's consideration of the issue at this time. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 227 (8th ed. 2002) ("[A] conflict of decisions may safely be relied on as a ground for *certiorari* only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone.") (quoting Justice Harlan).

Petitioners virtually concede this point by asserting that the D.C. Circuit should have referred the § 201(b) question to the FCC under the primary jurisdiction doctrine instead of remanding for dismissal. *See* Pet. 16-17, 20-22. Petitioners wisely do not request a primary jurisdiction referral from this Court. Having failed to seek such a referral from the D.C. Circuit, and having successfully *opposed* referral in the district court, Petitioners have waived any such right.[6] Petitioners instead contend that the principles underlying the primary jurisdiction doctrine demonstrate that the D.C. Circuit *should have* referred the § 201(b) issue to the FCC *sua sponte*, rather than determining on its own that the general reference to § 201 in the ordering clause of the 1999 Order was not worthy of *Chevron* deference. Pet. 20-22. But this argument is fatal to the Petition: By acknowledging that the FCC can and should address the § 201(b) question based on a proper administrative record, Petitioners only confirm that the question does not warrant this Court's immediate attention.

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[6] *See Baltimore & Ohio Chicago Terminal R.R. Co. v. Wisconsin Cent. Ltd.*, 154 F.3d 404, 411 (7th Cir. 1998) ("[T]he doctrine of primary jurisdiction is not, despite its name, jurisdictional. Instead, it presupposes that the court . . . has jurisdiction over the case. It is therefore waivable"); *Gross Common Carrier v. Baxter Healthcare Corp.*, 51 F.3d 703, 706 (7th Cir. 1995) (same); *United States v. Bessemer & Lake Erie R.R. Co.*, 717 F.2d 593, 599 (D.C. Cir. 1983) (same).

C. The § 201(b) Question Has Limited Importance.

Because this case only involves alleged violations of the superseded 1999 Order, the § 201(b) question presented by the Petition has limited importance. The Telcom Act contains a two year statute of limitations for complaints against carriers for the recovery of damages. *See* App. 125a (holding that the two year statute of limitations set forth in § 415(b) "applies equally to actions in district court"). The present action and a few other cases pending in different jurisdictions are the last of their kind; the window for payphone compensation claims under the 1999 Order has closed. And because the 2003 Order was adopted to help eliminate the types of compensation disputes and problems created by the 1999 Order, the prospect of additional litigation over the new payphone compensation plan should be reduced. Thus, the § 201(b) issue raised in the Petition lacks sufficient importance for this Court's intervention.

II. THE D.C. AND NINTH CIRCUITS APPLIED SETTLED PRECEDENTS IN FINDING NO PRIVATE RIGHT OF ACTION UNDER § 276 TO ENFORCE THE FCC'S PAYPHONE COMPENSATION PLAN.

The D.C. and Ninth Circuits are the only circuit courts to consider whether § 276 confers a private right of action for disputes arising under the FCC's payphone compensation plan. Both courts applied properly stated principles from *Sandoval* and *Chevron* in concluding that Congress did not intend for § 276 to create such a remedy. Although Petitioners may disagree with the outcome of the D.C. and Ninth Circuits' analyses, the question does not merit this Court's review. "[C]ertiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Petitioners contend that "[u]nder the proper reading of *Sandoval* and *Chevron* the distinction between the Act and FCC regulations is a distinction that makes no difference." Pet. 25. They cite *Sandoval* for the proposition that "'[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of that statute to be so enforced as well.'" Pet. 26. Petitioners then argue that, through its various payphone compensation orders, the FCC has "authoritatively construe[d]" § 276 to impose payphone compensation duties on IXCs and that this interpretation must be accorded *Chevron* deference. Pet. 26-27. Hence, under Petitioners' theory, an alleged violation of the FCC's payphone compensation plan is equivalent to an alleged violation of § 276 and redressable in federal court through the §§ 206/207 private right of action.

The D.C. and Ninth Circuits properly applied *Sandoval* and *Chevron* in rejecting this notion. Indeed, *Sandoval* refuted the very argument Petitioners make here. Like Petitioners, "the Government and respondents [in *Sandoval*] argue[d] that the [agency] *regulations* contain rights-creating language and so must be privately enforceable . . . ." *Sandoval*, 532 U.S. at 291 (emphasis in original). But as this Court observed, this "argument skips an analytical step. Language in a regulation may invoke a private right of action that Congress *through statutory text* created, but it may not create a right that Congress has not." *Id.* (emphasis added). Thus, *Sandoval* makes clear that "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

Applying these principles, the D.C. and Ninth Circuits examined the text and structure of § 276 to ascertain congressional intent and found no rights-creating language that might confer a private remedy for PSPs against IXCs. As the D.C. Circuit observed, "[n]othing in the statute requires the [FCC] to designate the IXC as the party responsible for dial-around payment." App. 14a. The Ninth Circuit reached the same conclusion, noting that § 276 "does not say 'PSPs shall be entitled to fair compensation,' or 'IXCs shall pay PSPs.'" *Greene*, 340 F.3d at 1050. Section 276 is addressed solely to the FCC and directs the agency to adopt a payphone compensation plan. The statute does not suggest (let alone require) that IXCs must compensate PSPs. Both courts properly held, therefore, that the statute cannot be violated by IXCs. And because the §§ 206/207 private right of action only applies to common carrier violations of the Act, § 276 displays no intent by Congress to create a private remedy. *See* App. 14a; *Greene*, 340 F.3d at 1050-51. That the FCC ultimately chose, for administrative convenience, to assign payment obligations to IXCs under its payphone compensation plan cannot, in *Sandoval*'s words, "create a right that Congress has not." 532 U.S. at 291.

The D.C. and Ninth Circuits also properly declined to afford *Chevron* deference to the FCC's interpretation of § 276 in the 1999 Order. *Chevron* deference only applies when a statute is ambiguous and the agency's interpretation of it is reasonable. *Chevron*, 467 U.S. at 843-44. The D.C. Circuit acknowledged that the FCC "mentioned [§ 276] throughout [the 1999 Order] as the source of its authority" to implement a payphone compensation plan. App. 15a. But, as the D.C. Circuit recognized, whether a statute is a source of authority for regulatory action and whether the statute creates a private right of action for violations of agency regulations are two different matters. In light of *Sandoval*, the D.C. Circuit correctly looked to the text and structure of the Act "to determine whether [the statute] displays an intent to create

not just a private right *but also* a private remedy." App. 11a, 13a-14a (applying *Sandoval*, 532 U.S. at 286-87) (emphasis added). Having determined that § 276 is unambiguously directed to the FCC, and does not address the rights or obligations of any private parties, the D.C. Circuit properly declined to afford *Chevron* deference to the FCC's view that IXCs could violate the statute: "Because the IXCs are not regulated by § 276, there is no way in which they could have violated that provision." App. 14a.

The Ninth Circuit in *Metrophones* similarly acknowledged that the FCC had asserted, in its 2003 Order, that a failure to pay compensation under its new plan would violate § 276. *Metrophones*, 423 F.3d at 1064 n.4. The Ninth Circuit refused to afford *Chevron* deference to this bare assertion and affirmed its prior holding in *Greene* that Congress did not intend to create a private remedy under the statute. *Id.*

In sum, both the D.C. and Ninth Circuits applied properly stated rules of law in concluding that § 276 does not confer a private right of action to enforce the FCC's payphone compensation plan. The rulings were correct and do not warrant review by this Court.

III. WHETHER § 416(c) CONFERS A PRIVATE RIGHT OF ACTION FOR PAYPHONE COMPENSATION DISPUTES DOES NOT MERIT THIS COURT'S REVIEW.

Section 416(c) of the Telcom Act requires all persons "to observe and comply with [FCC] orders." App. 179a. The D.C. and Ninth Circuits both held that § 416(c) does not confer a private right of action for alleged violations of the FCC's payphone compensation plans. App. 17a-20a; *Metrophones*, 423 F.3d at 1071. These rulings were correct and do not merit this Court's consideration.

In rejecting the arguments of Petitioners (and the FCC as *amicus*) on this point, the D.C. Circuit adopted the reason-

ing of then-Judge Breyer, in *New England Telephone*, that § 416(c) applies "only to adjudicatory and not to rulemaking decisions." App. 18a-19a (citing 742 F.2d at 4-9). The D.C. Circuit determined that a contrary interpretation of § 416(c)

> would render § 201(b) superfluous: any failure to comply with a regulation, not only unjust and unreasonable practices, would be a violation of the Act and therefore actionable under §§ 206 and 207. Such a construction simply cannot be. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) ("It is . . . a cardinal principle of statutory construction that a statute ought, upon the whole, be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant.").

App. 19a.

In *Metrophones*, the Ninth Circuit held that a carrier's obligation to compensate PSPs under the payphone compensation plan is not enforceable as a violation of § 416(c), regardless whether the provision applies to regulatory as well as adjudicatory "orders." Like the D.C. Circuit, the Ninth Circuit reasoned that "to hold that §§ 206 and 207 encompass all violations of § 416(c) would render superfluous the requirement that an action under § 206 allege a violation of a *statute*." *Metrophones*, 423 F.3d at 1071 (emphasis in original).

Petitioners assert that the decisions of the D.C. and Ninth Circuits on the § 416 question "deepen" a circuit split over whether regulatory and adjudicatory orders are "orders" within the meaning of §§ 401(b) and 416(c), Pet. 22-24, and will "generate confusion and inconsistency" among lower courts facing the same question, Pet. 24. Petitioners' assertion is demonstrably overstated. This Court has tolerated the

circuit "split" on the § 416 issue for nearly twenty years.[7] And for good reason: As Petitioners are forced to acknowledge, the issue has virtually no real-world consequences. "[E]ven though it has been clearly established in six circuits that rulemaking orders are 'orders' under the Act, *very few cases* alleging violations of FCC rules have been filed in those circuits." Pet. 24 n.13 (emphasis added).

Because actions involving this narrow question are rare—even in the circuits that consider rulemakings to be "orders"—the D.C. and Ninth Circuits' rulings will cause little, if any, tension in the lower courts. Accordingly, the issue is unworthy of this Court's attention.

IV. SERIOUS STANDING ISSUES MAKE THIS CASE AN INAPPROPRIATE VEHICLE FOR REVIEW.

Even if the questions presented by the Petition merited the Court's attention, this case presents an unsuitable vehicle for reviewing them because of the significant standing issues that arise from the assignments under which Petitioners have sued. As a threshold matter, the Court would have to resolve the standing issues before it could turn to the questions presented by the Petition. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-91 (1998).

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[7] In 1984, the First Circuit concluded that § 401(b) is limited to adjudicatory orders. *New England Tel.*, 742 F.2d at 4-9. This Court denied *certiorari*. 476 U.S. 1174 (1986). In 1987, the Ninth Circuit reached a contrary conclusion. *Hawaiian Tel. Co. v. Public Utils. Comm'n*, 827 F.2d 1264, 1270-72 (9th Cir. 1987). Despite this split, the Court denied *certiorari*. 487 U.S. 1218 (1988). The Fourth, Fifth, Sixth, Seventh and Eighth Circuits decided the issue before 1990, siding with the Ninth Circuit. *See Alltel Tenn., Inc. v. Tennessee Pub. Serv. Comm'n*, 913 F.2d 305, 308 (6th Cir. 1990) (citing circuit cases). The Fourth, Fifth, and Eighth Circuit decisions were vacated by this Court, on other grounds, in light of *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). *See Alltel*, 913 F.2d at 308 (noting vacaturs).

The contractual arrangements between the Aggregator-Petitioners and the PSPs feature assignments in which a PSP "assigns, transfers, and sets over to [the aggregator] *for purposes of collection* all rights, title, and interest of the [PSP] in the [PSP's] claims, demands or causes of action for 'Dial Around Compensation.'" App. 4a (emphasis added). Under the assignments, the aggregators must pass back to the PSPs any and all amounts they collect in litigation brought on behalf of the PSPs or in settlement of the PSPs' claims. App. 4a, 9a, 23a-24a. Nor do they have any other financial interest in the outcome of the litigation: their compensation is not tied to litigation success, but rather, to "the number of payphones and telephone lines operated by their PSP clients." App. 23a.

By a 2-1 vote, the D.C. Circuit held that the Aggregator-Petitioners had a sufficient "personal stake" in the litigation to give them Article III standing, even though the assignments obligate them to pass back all amounts recovered to the PSPs. App. 10a. In reaching that conclusion, the majority sought "guidance" from Federal Rule of Civil Procedure 17(a), which governs real parties in interest. App. 9a. According to the majority, "[w]hat the aggregators have promised to do with any recovery is irrelevant to their standing—as it would be to their status as real parties in interest." App. 10a.

The majority erred in conflating the Rule 17(a) real party in interest inquiry with the Article III standing inquiry. Although both Rule 17 and Article III require litigants to demonstrate legal injury, "several other elements of the standing doctrine are clearly unrelated to . . . Rule 17(a), and plaintiff must be both the real party in interest and have standing." 6A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 1542, at 330 (1990). As Judge Sentelle observed in his dissent from the standing ruling, the majority glossed

over the glaring Article III standing problems created by the assignments requiring complete pass-through of any recovery from the aggregators to the PSPs. App. 23a-24a. At bottom, those assignments deprive nearly every one of the Petitioners of any concrete, personal stake in these lawsuits that is necessary for a litigant to have Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).[8] Judge Sentelle also pointed out (App. 25a) that the Aggregator-Petitioners do not satisfy this Court's Article III "associational standing" requirements that would enable them to sue under the assignments on behalf of the PSPs whom they purport to represent. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

In the end, the standing issues flowing from the assignments are thorny. They furnish an important, additional ground for denying the Petition.

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[8] As Judge Sentelle remarked in his dissent on the standing question (App. 23a), that the aggregators keep nothing they recover distinguishes this case from the assignment in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), under which a qui tam relator was paid a "bounty" for any recoveries on behalf of the government. *Id.* at 772-73.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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No. 05-766

FILED
MAR 1 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

APCC SERVICES, INC., ET AL.,

Petitioners,

v.

SPRINT COMMUNICATIONS COMPANY L.P., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

This Court has granted certiorari in *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, No. 05-705, to decide whether payphone service providers (PSPs) may invoke the right of action created by 47 U.S.C. §§ 206-207 to assert claims that common carriers have engaged in an "unjust and unreasonable" practice, in violation of 47 U.S.C. § 201(b), when those carriers fail to pay compensation to PSPs in accordance with FCC regulations. This case squarely presents the same question. In *Metrophones*, the Ninth Circuit held that PSPs have a right of action grounded on a violation of Section 201(b); in this case, the D.C. Circuit majority reached the opposite conclusion.

This case (unlike *Metrophones*) presents two other closely related issues that also merit review: (1) an acknowledged conflict between (on one side) the First and D.C. Circuits, both of which have held that the term "order" in the Communications Act refers only to adjudicatory orders, and (on the other) the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, which have held that the term also encompasses certain rulemaking orders; and (2) whether *Alexander* v. *Sandoval*, 532 U.S. 275 (2000), precludes plaintiffs from invoking the express right of action in Sections 206-207 to allege violations of 47 U.S.C. § 276 merely because Congress, in Section 276, chose to delegate to the FCC the details of complying with the congressional ultimatum that PSPs be "fairly compensated for each and every completed intrastate and interstate call."

Respondents argue that none of these issues warrants review by this Court. They are wrong.

I. There Is An Irreconcilable Conflict Between The D.C. Circuit's Decision In This Case And The Ninth Circuit's Decision In *Metrophones*

Respondents do not dispute that (1) Congress *expressly* required that PSPs be compensated for "each and every com-

pleted intrastate and interstate call" and delegated authority to the FCC to take "all actions necessary" to "ensure" that PSPs receive compensation, 47 U.S.C. § 276(b)(1)(A); (2) Congress *expressly* "declared to be unlawful" common carrier practices that are "unjust or unreasonable," 47 U.S.C. § 201(b); (3) Congress *expressly* created a right of action to sue in federal court *or* to complain to the FCC to recover damages suffered in consequence of any practice by a common carrier that is "declared to be unlawful," 47 U.S.C. §§ 206-208; (4) the FCC *expressly* determined that "[a] failure to pay compensation in accordance with the Commission's payphone rules * * * constitutes * * * an unjust or unreasonable practice in violation of section 201(b) of the Act," 2003 Order ¶ 32. Those undisputed propositions provide ample support for petitioners' (and the Ninth Circuit's and the FCC's) position that a carrier's refusal to pay the required compensation violates Section 201(b), and that PSPs may recover unpaid compensation through suits in federal court pursuant to the right of action created by Sections 206-207.

Respondents have now invented a new rationale for the D.C. Circuit's decision, suggesting that the conflict between the D.C. and Ninth Circuits can be reconciled because the D.C. Circuit examined claims arising under the FCC's 1999 payphone compensation order, while the Ninth Circuit examined claims arising under the 2001 Order. Br. in Opp. 15-16. That argument fails for two reasons.

First, there is *nothing* in the Ninth Circuit's *Metrophones* decision that suggests the decision turned on whether the claims arose under the 2001 Order or the 1999 Order, and there is *nothing* in the D.C. Circuit's decision suggesting that this distinction mattered. Indeed, there is nothing in respondents' own arguments to suggest that this factual distinction should matter. Respondents argue that the FCC's determination in 2003 that a violation of its payphone orders is an unjust and unreasonable practice cannot properly be applied to violations

of the 1999 Order *or* the 2001 Order, because such application would constitute a "retroactive" rule. Br. in Opp. 17-18. If that argument had any validity (as we show below, it does not) it would not reconcile the circuit conflict; it would merely indicate that the Ninth Circuit (rather than the D.C. Circuit) erred.

Second, respondents' retroactivity theory is, in any event, squarely inconsistent with decisions of this Court and many courts of appeals. Thus, even if that theory could explain the D.C. Circuit's decision, it would merely demonstrate that the decision conflicts in other respects with settled law.

Reiter v. *Cooper*, 507 U.S. 258 (1993), explains why. There, the Court reinstated a claim under the Interstate Commerce Act[1] for recovery of "unreasonable" charges, even though the claim was asserted before the agency had made any determination about the reasonableness of the charges, and even though such an agency determination was a prerequisite for plaintiff's recovery. The Court did not "discern within the ICA an intent that * * * ICC determination of the reasonable-rate issue must be obtained before filing the civil action." 507 U.S. at 269-270. If an agency properly can make a determination of unreasonableness after a suit is filed, as *Reiter* holds, then *a fortiori* it may make such a determination after the conduct that gave rise to the suit.

That principle is a necessary predicate for many decisions in cases alleging violations of Section 201(b) of the Communications Act, in which plaintiffs asserted claims that a practice or rate was unreasonable, even though the FCC had not yet made such a determination when the suit was filed. See, *e.g.*, *AT&T*

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[1] "The Communications Act, of course, was based upon the I[nterstate] C[ommerce] A[ct] and must be read in conjunction with it." *MCI Telecommunications Corp.* v. *FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990), *cited with approval in MCI Telecommunications Corp.* v. *AT&T*, 512 U.S. 218, 229-230 (1994).

Corp. v. *FCC*, 317 F.3d 227 (D.C. Cir. 2003); *MCI Telecommunications Corp.* v. *FCC*, 59 F.3d 1407 (D.C. Cir. 1995); *In re Long Distance Telecommunications Litigation*, 831 F.2d 627 (6th Cir. 1987); *Pacific Tel. & Tel. Co.* v. *MCI Telecommunications Corp.*, 649 F.2d 1315 (9th Cir. 1981).

The only authority that respondents cite in support of their retroactivity theory is *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204 (1988), but that case involved a retroactive adjustment to the compensation owed for services rendered before the adjustment. There is no such retroactivity in this case or in *Metrophones*. Petitioners seek only compensation that is owed under the 1999 Order for calls that were made *after* the 1999 Order established respondents' legal obligation to pay compensation. They do not seek retroactive application of the compensation obligations imposed by the 1999 Order or by any other order. Moreover, the statute that was violated here, Section 201(b), was enacted in 1934, long before respondents engaged in the unjust or unreasonable practice that gave rise to this case.

As we explained in our petition (at 16), the D.C. Circuit should have asked (as the Ninth Circuit asked) whether the violation of the payphone compensation orders is an unjust or unreasonable practice, and, under *Chevron*, it should have deferred to the FCC's answer (in its 2003 Order and in its amicus brief) to that question.[2] Instead, the D.C. Circuit asked whether

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[2] On the merits, respondents make the insubstantial – and misleading – argument that deference is unwarranted because the FCC provided no notice and opportunity for comment before it reached its determination that a failure to comply with the payphone compensation orders is an unjust or unreasonable practice violating Section 201(b). Br. in Opp. 17. Respondents' argument is misleading because they focus on the notice preceding the 1999 Order to the exclusion of the notice preceding the 2003 Order. And respondents' argument is insubstantial because, as we showed in the petition (at 8-9), the 2003 rulemaking expressly placed in issue the question of what remedies exist for violations of the payphone compensation orders. AT&T itself

the FCC *has declared* the practice to be unjust and unreasonable, provided an answer to that question that is indisputably wrong, and dismissed the case on that basis.

II. The Court Should Correct Erroneous Interpretations Of *Alexander* v. *Sandoval* By The Ninth And D.C. Circuits

Respondents rely on *Alexander* v. *Sandoval*, 532 U.S. 275 (2000), to assert that – notwithstanding the FCC's *Chevron*-deference-worthy conclusion to the contrary – petitioners cannot invoke the express right of action created in Sections 206-207 by alleging a violation of Section 276. They argue that even if two courts of appeals (the D.C. Circuit in this case and the Ninth Circuit in *Greene* v. *Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003)) have misconstrued *Sandoval*, this Court should not clarify the meaning of that decision. Br. in Opp. 22.

In *Sandoval*, the plaintiffs asserted that the implied right of action to sue for violations of Section 601 of Title VI, which prohibits only intentional discrimination, should be expanded to encompass violations of regulations (promulgated under Section 602) prohibiting conduct that was *not* addressed by Section 601, *i.e.*, practices that have a disparate impact. *Sandoval* held there is no implied right of action to sue for violations of such disparate-impact regulations. "[T]he disparate-impact regulations do not simply apply § 601 – since they indeed forbid conduct that § 601 permits – and therefore [it is] clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations." 532 U.S. at 286. Because the regulations are not an "authoritative interpretation"

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emphasized in response the existence of remedies under Sections 206-208, the very remedies AT&T (and Sprint) now claim do not exist. Furthermore, as far back as 1999 *both* AT&T and Sprint touted the existence of such remedies in a D.C. Circuit brief. See Pet. 7. Other than their incorrect "retroactivity" argument, respondents are noticeably silent about the inconsistency between their their current position and positions they took in 1999 and 2003.

of Section 601, a failure to comply with those regulations "that is not also a failure to comply with Section 601 is not actionable" under the right of action for violations of Section 601. *Id.* at 284. A private right of action would have been available if but only if Section 602 (like Section 601) conferred such a right of action. *Id.* at 286.

Here, Sections 206-207 provide the necessary *express* cause of action, and there is no dispute that the FCC's payphone compensation orders "apply" Section 276 and constitute an "authoritative interpretation" of that statutory provision. The FCC did precisely what Congress required: it devised a plan to "ensure" compensation for "each and every" completed payphone call. The statute contains "rights-creating language" (*Sandoval*, 532 U.S. at 288) in the only sense that matters: Congress conferred on PSPs a right to compensation because any failure by the FCC to "ensure" compensation would violate Congress's express command. The court of appeals failed to recognize PSPs' rights only because *Congress* did not require compensation to be paid by respondents, but instead delegated to the FCC the responsibility of deciding which parties should pay compensation. Pet. App. 14a ("Nothing in the statute requires the Commission to designate the IXC as the party responsible for dial-around payment.").

Two circuits have now misinterpreted *Sandoval*. That decision, properly read, requires courts to ask whether Congress intended to create private rights. Here, *Sandoval* has been misconstrued as a limitation on Congress's authority to delegate to a regulatory agency the responsibility for devising detailed rules to ensure protection of the rights that Congress unequivocally meant to create. That misinterpretation of *Sandoval* seriously undermines *Chevron* principles and ignores the cautionary language in *Sandoval* that specifically sought to avoid such a result. *Sandoval* emphasized that, when an agency exercises authority delegated by Congress to construe and implement a

statutory directive, "it is meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Id.* at 285.

The transformation of *Sandoval* into a broad limitation on Congress's ability to delegate authority to devise detailed rules necessary to implement congressional policy threatens serious mischief. There is no reason to defer correction of this misinterpretation until other circuits commit the same error, or until a circuit split is created because another court of appeals correctly interprets *Sandoval*.

III. The Court Should Resolve The Circuit Split Concerning The Meaning Of "Order" In The Communications Act

Respondents concede, as the D.C. Circuit acknowledged in this case (Pet. App. 18a-19a), that the courts of appeals have adopted inconsistent interpretations of the term "order" as it is used in critical provisions of the Communications Act. Br. in Opp. 27. The First and D.C. Circuits have construed the term to encompass only adjudicatory orders; the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have held that the term may also encompass rulemaking orders. Respondents do not even try to reconcile these conflicting decisions. They only argue that the circuit conflict is "unworthy of this Court's attention" (*ibid.*) – even though the question involves statutory provisions that are central to the enforcement of FCC orders – because cases presenting this issue are "rare" (*ibid.*) – even though respondents themselves refer to eight cases (not including *Metrophones*) involving this precise issue that have been decided by courts of appeals (*id.* at 27 n.7). Those cases demonstrate that this issue arises on a recurring basis in cases presenting

violations of substantial economic importance.[3] The disparate holdings of the Ninth Circuit in *Metrophones* and the D.C. Circuit in this case (Pet. 22-25) are a direct result of this Court's failure thus far to resolve the conflict among the circuits. If the conflict is not resolved now, it will inevitably produce still more confusion in future cases.

This Court has held that the term "order" (in Section 402) encompasses rulemaking orders that are "adopted by the Commission in the avowed exercise of its rule-making power" and that "have the force and effect of law." *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 417 (1942). It should resolve confusion in the lower courts by granting certiorari to decide, in this case, whether the term has the same meaning in Section 416, a companion provision to Section 402.

IV. It Is Clear That Petitioners Have Standing To Sue

This case does not present any "thorny" issues of standing, notwithstanding respondents' efforts (Br. in Opp. 27-29) to suggest otherwise. Respondents concede, as the D.C. Circuit unanimously acknowledged, that some of the petitioners are PSPs suing to recover unpaid compensation and that those petitioners have alleged a direct injury in fact sufficient to confer standing. Therefore, there is no question that the Court could reach and resolve the circuit conflicts presented by this case, regardless of whether the subset of petitioners who sued as assignees have standing.

Even as to the standing of assignees, this case involves an unremarkable – and clearly correct – application of established

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[3] These cases also show that concerns about enabling frivolous lawsuits for "every" violation of an FCC regulation (see Pet. App. 19a; *Metrophones*, 423 F.3d at 1071) have no foundation in practical experience or, as we explained in our petition (at 24 n.13) in the language of the statute.

law. *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), squarely held that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.* at 773.

Respondents argued in the court of appeals that *Vermont Agency* does not control here, because the assignee in *Vermont Agency* intended to keep a portion of its recovery under the assigned claims, whereas the assignees here have agreed to pass back to the assignors all damages recovered. But *Vermont Agency* clearly rejected that argument. Standing in that case did not depend on the assignee's "bounty" because the bounty, much like a wager on the outcome of a case, was "an interest that * * * cannot give rise to a cognizable injury in fact for Article III standing purposes." 529 U.S. at 773. The relevant question is whether the *assignor* suffered an injury in fact sufficient to confer standing, not whether the assignee intends to keep some, all, or none of the damages resulting from that injury. *Id.* at 774 ("We conclude, therefore, that *the United States'* injury in fact suffices to confer standing on respondent Stevens.") (emphasis added). In addition, as the district court (Pet. App. 66a-73a) and court of appeals majority (Pet. App. 8a-11a) correctly determined, two older decisions of this Court squarely hold that assignees-for-collection are entitled to assert the assignors' injury, and there is no contrary authority. See *Titus* v. *Wallick*, 306 U.S. 282, 289 (1939); *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117, 134 (1920). Petitioners' standing cannot be seriously doubted.

V. This Case Should Be Accepted for Plenary Review and Consolidated With *Metrophones*

Because this case presents questions that are intertwined with the questions presented in *Metrophones*, and because the additional questions presented in this case merit review, the Court should grant the petition in this case and consolidate it with *Metrophones*. By doing so, with very little expenditure of

additional resources or effort, the Court will be able to consider all rather than just some major aspects of the problem presented. It will have the opportunity to resolve another significant circuit conflict, to correct the misinterpretation of its decision in *Sandoval*, and to construe the specific statutory provision (Section 276) in which Congress focused on the problem underlying both cases, *i.e.*, the right Congress wished to confer on PSPs to receive compensation for dial-around calls.

If the Court chooses not to grant this petition and consolidate it with *Metrophones*, it should hold this petition for appropriate disposition after it decides *Metrophones*.

CONCLUSION

The petition for a writ of certiorari should be granted and this case should be consolidated with *Metrophones*. If the petition is not granted for plenary review at this time, it should held and disposed of as appropriate in light of the Court's disposition of *Metrophones*.

Respectfully submitted.

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MARCH 2006